Supreme Court, U.S.
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97 1002 DEC 15 1997

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No. _____

In the
Supreme Court of the United States
October Term, 1997

Nancy J. Kobrin,

Petitioner,

v.

University of Minnesota;
The Regents of the
University of Minnesota,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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121 pp

QUESTIONS PRESENTED

1. Where there is no request for modification of a consent decree and no showing of a change in circumstances warranting its modification, does a court have authority, in accord with due process and this Court's decisions in United States v. Swift & Co., 286 U.S. 106 (1932) and Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992), to modify the consent decree's terms by its unilateral refusal to enforce its terms?

2. Is a party's objection to a special master's failure to adhere to the dictates of the limited authority conferred upon it timely raised where the party's objection to the special master's unauthorized action is presented, by motion, to the district court at the time the special master's recommendation is presented to the district court for its adoption, modification or rejection?

LIST OF THE PARTIES TO THE PROCEEDINGS BELOW

The parties to the appeal in the United States Court of Appeals for the Eighth Circuit, whose judgment Petitioner requests be reviewed, include Petitioner Nancy Kobrin and Respondents University of Minnesota and Regents of the University of Minnesota.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nancy Kobrin (Kobrin) respectfully petitions that a writ of certiorari issue to review the August 12, 1997 decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Court of Appeals' decision, dated August 12, 1997, is reported at 121 F.3d 408 (8th Cir. 1997). (Appendix [A]-1.) The district court's May 7, 1996 Memorandum and Order is not reported. (A-20.)

JURISDICTION

The Court of Appeals' decision of which review is sought was rendered in an opinion filed August 12, 1997. (A-1). The Court of Appeals denied a timely petition for rehearing on September 16, 1997. (A-1, A-102.) This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

This Court has recognized that the vindication of legal rights depends "more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedent." Wingo v. Wedding, 418 U.S. 461, 474 (1974), quoting Speiser v. Randall, 357 U.S. 513, 520 (1958). Accordingly, the procedure by which the facts of a case are determined is as important to the resolution of the claim as the validity of the substantive rule of law to be applied. Id. This case presents the important question of whether the federal district court has authority, in accord with due process, to unilaterally alter the terms of a consent decree, which decree sets forth, in detail, the procedure on how disputes between the parties are to be determined. This case also presents the important procedural question of when a party must object to a special master's actions or risk a determination that it has waived its rights.

A. The Facts Material to This Court's Consideration of the Questions Presented.

1. The Rajender Consent Decree.

In 1980, after eleven weeks of trial and intense negotiation, a class action brought by female academic nonstudent employees charging Respondent University of Minnesota (University) with discrimination on the basis of sex was settled. Rajender v. University of Minnesota, 730 F.2d 1110, 1111 (8th Cir. 1984). A consent decree (known as the Rajender Consent Decree) was entered into by the parties, approved by the court and which terms were subject to future enforcement by the federal district court. Pursuant to the Rajender Consent Decree, the University was permanently enjoined from discriminating against women on the basis of

sex with respect to the terms and conditions of employment, including recruitment, hiring and promotion. (A-53.)

The Rajender Consent Decree provides, generally, that the burdens of proof of the parties will be those placed on litigants in civil actions under Title VII. It, however, increases the University's burden beyond Title VII as follows:

> Evidence of statistical disparity or the lack thereof may be introduced in any such hearing and shall be given the weight accorded thereto by statute or judicial decision in employment discrimination cases under Title VII. If the burden of going forward shifts to the University, the University shall have, in addition to the burdens otherwise provided by law, the burden of proving, by the preponderance of the evidence, that the search procedures prescribed by Exhibit B (for hiring decisions or decisions not to fill a faculty position) . . . were followed in good faith.

(Consent Decree § II(D)(8), A-69-70.) The Rajender Consent Decree also limits the amount that can be awarded a claimant, specifically limiting the attorneys' fees recoverable to an amount not to exceed $6,000. (Consent Decree § II(D)(9), A-70-71.)

Special procedures were set out in the Rajender Consent Decree under which claimants' claims are to be determined. Pursuant to the terms of the Rajender Consent Decree, the district court appoints a Special Master(s). (Consent Decree § IV(A), A-79.) The University pays to the court the expenses and fees of the Special Master, which in turn pays the Special Master. (Consent Decree § IV(B), A-80.) A member of the class, such as Kobrin, who wishes to assert a discrimination claim against the University files her claim with that Special Master. (Consent Decree § II(A), A-63.)

The factfinder of the claimant's claim is a Hearing Panel convened by the Special Master. The Rajender Consent

Decree provides that the Special Master is to "direct the claimant and the academic unit involved each to designate one person to sit as a member of the panel to hear the claim." (Consent Decree § II(D)(5), A-67.) These two designated persons and the Special Master constitute the Hearing Panel. (Id.)

The Special Master presides at the hearing and regulates the course of the proceeding. (Consent Decree § II(D)(7), A-69.) The parties are to be afforded a reasonable opportunity to present their case to the Hearing Panel and the proceedings before the Hearing Panel are governed by the Federal Rules of Evidence and the Federal Rules of Civil Procedure. (Consent Decree § II(D)(7), A-69.) The evidentiary rulings are made by the Special Master. However, the ultimate merits of the claim are to be determined "by majority vote of the panel." (Id.)

Under the Rajender Consent Decree, it is the Special Master who formulates in writing the findings of fact, conclusions of law and recommendations based solely on the evidence and the record which support the Hearing Panel's determination. (Consent Decree § II(D)(10), A-72.) The federal district court's review is governed by Fed. R. Civ. P. 53(e)(2). (Consent Decree § II(D)(10), A-72.) Review by the United States Court of Appeals for the Eighth Circuit may be made on appeal from the judgment of the district court. (Id.) Rajender, 730 F.2d at 1113.

2. Kobrin's Rajender Claim.

In late August 1989, Kobrin filed her Rajender claim with the Special Master alleging sex discrimination and violation of the Rajender Consent Decree for its hiring of Peter Canning, a male, for a tenured junior professor position in the Department of Comparative Literature. After the Department failed to renew her lecturer position, Kobrin filed a second Rajender claim. The second claim alleged that she was terminated in retaliation for filing her first claim.

On November 18, 1992, the University moved for summary judgment. The Special Master granted the University's motion for summary judgment, which decision was adopted by the federal district court. Final judgment was entered on June 21, 1993. The United States Court of Appeals for the Eighth Circuit reversed the grant of summary judgment on Kobrin's failure to hire claim, but affirmed the dismissal of her retaliation claim. Kobrin v. University of Minnesota, 34 F.3d 698 (8th Cir. 1994). The case was remanded for a hearing.

3. Proceedings Before Special Master on Remand.

Upon remand, the Special Master did not, in accord with the terms of the Rajender Consent Decree, direct Kobrin and the University to each designate a person to sit on the Hearing Panel nor did he ever convene the Consent Decree's required three-person Hearing Panel. The Special Master took it upon himself to act as the sole determiner of Kobrin's claim. The Special Master, based on his determination of the facts, concluded that Kobrin had failed to prove that the University's articulated reason for its employment decisions was merely a pretext for gender discrimination. He therefore concluded that Kobrin had failed to establish that the University intentionally discriminated against her. (A-31.)

4. Proceedings Before Federal District Court.

Pursuant to the terms of the Rajender Consent Decree, Kobrin brought a motion before the district court requesting that the district court reject the Special Master's Findings of Fact, Conclusions of Law and Recommended Order. Kobrin specifically asserted to the district court that the Special Master's failure to convene the three-person Hearing Panel mandated rejection of the Special Master's Recommended

Order and the case must be remanded to a three-person Hearing Panel. In response, the University admitted that while no modification had been made to the Consent Decree's requirement that Kobrin's claim be decided by a Hearing Panel, it argued that because "numerous cases have proceeded in this manner," therefore there was no actual or arguable prejudice to "any claimant." (University's Memorandum of Law in Opposition to Claimant's Objections to Report and Recommendation of Special Master, p. 3 n.2 (April 8, 1996).)

When the University asserted at the motion hearing before the federal district court that Kobrin had waived her right to a hearing panel by not raising the issue at an earlier point in time, the following exchange occurred:

> THE COURT: But Counsel, how did we get from here to there? I really am curious about this because of the large number. Well, it isn't all that great, but a substantial number of Rajender cases that have gone through over the years.
>
> MS. FLEMING-WOLFE [counsel for the University]: Yes, yes.
>
> THE COURT: And this whole question, to my memory, is new.
>
> MS. FLEMING-WOLFE: Yes, it is.
>
> THE COURT: We have one Special Master hearing these cases.
>
> MS. FLEMING-WOLFE: That's right, Your Honor. During the course of the litigation of these matters from its very inception, the process has changed over time. This is not something that has been, as the claimant suggested,

> imposed by the University despite people's objections.
>
> . . .
>
> THE COURT: I appointed the master. We started with that.
>
> MS. FLEMING-WOLFE: Right. So, I want to just --
>
> THE COURT: But there was a time very early on on my watch that the Rajender Decree was amended. I don't know what was in that. And frankly, I didn't get it out and look. Did that amend to a single, or something, or is it just a case that somehow has just evolved into one person hearing it?
>
> MS. FLEMING-WOLFE: That's right, Your Honor. It has not been specifically amended to allow for that, but over the course of time it has evolved into a one-person proceeding.

(Hearing Transcript May 3, 1996, pp. 22-23, A-96-98.)

It is undisputed that no request for modification of the terms of the Consent Decree has ever been presented by the University nor accepted by the Rajender Class. Kobrin's counsel pointed out to the district court that what appears to have happened is that the University and the Special Master (which are the two constants in these Rajender proceedings) have simply decided to proceed in this fashion. (Hearing Transcript May 3, 1996, pp. 28-29, A-99-100; see also T. pp. 11-12, A-94-95.) The Rajender claimants would be unaware of how the University and Special Master have conducted other hearings, in that their only experience with the process

would be the hearings on their individual claims. Many of the claimants appear pro se because of the $6,000 cap on recoverable attorneys' fees. (Id.)

In affirming the Special Master's Findings of Fact, Conclusions of Law and Recommended Order for judgment, the district court did recognize that the Rajender Consent Decree, by its terms, specifically required that Kobrin's claims be decided by a three-person panel. (A-28-29.) The district court, nonetheless, affirmed the Special Master's failure to so convene, concluding that since Kobrin never requested such a panel from "either the University or the Special Master" and because Kobrin cannot demonstrate that she was prejudiced by such a forum, she has waived her right to such a hearing. (Id.)

The district court recognized that evidence was indeed presented that supported Kobrin's claim of discrimination. However, utilizing the clearly erroneous standard of review, the district court concluded that the Special Master's Findings of Fact were supported by the evidence. (A-21, A-23-28.) Since the district court concluded the factual findings were not clearly erroneous, the dismissal of her claims followed.

5. United States Court of Appeals' Opinion.

The United States Court of Appeals for the Eighth Circuit affirmed the district court's modification of the Consent Decree, concluding Kobrin had waived her right to a Hearing Panel. (A-13-14.) The sole support offered were cases decided under Fed. R. Civ. P. 53, which concerned a failure to object to the appointment of a special master. (Id.) The Eighth Circuit's opinion rests on its misconception that Kobrin had an objection to the appointment of a Special Master, which it then concludes she did not timely raise. Kobrin had no objection to a Special Master. Her objection, which was raised to the district court, was to the Special Master, once duly appointed, acting outside and contrary to the limited authority granted to him under the terms of the Rajender

Consent Decree. A timely petition for rehearing was denied on September 16, 1997. (A-102.)

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because this case presents the fundamental and important question of whether the federal district court, in accord with due process, has authority to refuse to enforce a consent decree's terms, and by such refusal, unilaterally modify that to which the parties have consented. Review is also warranted because the decision of the Court of Appeals conflicts with Fed. R. Civ. P. 53, which the Eighth Circuit used by analogy to determine waiver. This case gives the Court the opportunity to clarify when an objection must be raised to a special master's failure to follow the dictates of the limited authority conferred upon him.

I. A PARTY TO A CONSENT DECREE IS ENTITLED TO HAVE ITS TERMS ENFORCED BY THE FEDERAL DISTRICT COURT.

This case presents the threshold question of whether a federal court has the authority to alter a consent decree without the concurrence of both parties, where there is no pending motion for modification before it and where there is no showing of a change in circumstances warranting such modification. This Court's decisions in United States v. Swift & Co., 286 U.S. 106 (1932), and Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992), suggest to the contrary. The absence of an explicit case precedent on the propriety of a district court's refusal to enforce the consent decree's terms leaves the risk of fundamentally unjust deprivations of due process. This Court needs to make explicit that the courts must stand behind consent decrees and stand ready to enforce their provisions.

The Eighth Circuit itself has issued inconsistent opinions as to when judicial modification of a consent decree is appropriate. In Rajender v. University of Minnesota, 730 F.2d 1110 (8th Cir. 1984), the Eighth Circuit reviewed the district court's approval of a modification to the Rajender Consent Decree which removed the Decree's $6,000 limit on recoverable attorneys' fees. This was done after hearings on the requested modification. The Eighth Circuit, relying on this Court's decision in Swift, 286 U.S. at 114-15, concluded that since modification is only to be cautiously granted and the record did not support the kind of unforeseen hardship necessary to justify modifying the decree under the mandate of Swift, the district court's modification of the Consent Decree was an abuse of judicial discretion. Since the "cap" in fees was bargained for, it was not, according to the Eighth Circuit, up to the courts to save the parties from a bad bargain.

In contrast, the Eighth Circuit in this case approved the district court's unilateral modification of the Rajender Consent Decree. Unlike Rajender, no hearing for modification of the Consent Decree was held by the court. In fact, no modification of the procedural requirements of the Consent Decree has ever been sought by the parties, although the University obviously favored the abolition of the Hearing Panel. There was certainly no agreement by the Plaintiff Class to such a modification. Nor, like Rajender, was there any attempt by the district court to meet this Court's standard for modification of consent decrees as set forth in Swift or even the less rigorous standard for modification set forth in Rufo, 502 U.S. at 383-84. Nonetheless, the district court, by refusing to enforce the Consent Decree's terms ostensibly on the ground of waiver, worked as substantial a modification of the Consent Decree as that approved by the district court in Rajender, which was reversed by the Eighth Circuit.

The judicial modification cannot be excused on the ground of waiver. The Consent Decree itself sets forth what provisions of the Decree can be waived by a party. (Consent

Decree § 11(D)(1), (D)(11) and (J), A-64, A-72, A-79.) A right to a Hearing Panel is not one of the provisions enumerated in the Consent Decree that can be waived.

Nor does the Consent Decree require an affirmative act of the claimant demanding a Hearing Panel. Because of the limitation on the amount of recoverable attorneys' fees, it was anticipated that many of the claimants would be proceeding pro se. The Consent Decree is structured so as to require the Special Master to lead the claimants through the claims process. Under the Consent Decree it is the Special Master who is vested with the affirmative duty to initiate the Hearing Panel process and to affirmatively direct the claimant to designate her choice for this panel. The Special Master did neither. The Special Master's affirmative obligation is not one that could possibly be waived by a claimant. In addition, Kobrin timely presented her objection to the Special Master's unauthorized action by motion when the Special Master's recommendation was presented to the district court for adoption, modification or rejection.

A party, in accord with due process, is entitled to enforcement of the terms of the consent decree unless modification is formally and properly sought and the standards set forth by this Court for allowing such modifications are met. Settlement of actions by consent decrees are to be encouraged. To allow judicial modification by refusal to enforce the terms of the parties' agreement casts serious doubt on the sanctity of these agreements. The standard to be employed by the courts is in doubt and is being inconsistently applied. This Court's review is necessary.

II. THIS COURT'S CLARIFICATION OF WHEN A WAIVER OCCURS IS NECESSARY.

This case squarely presents the Court with the opportunity to define when a waiver occurs in a Fed. R. Civ. P. 53 situation, which was the analogy used by the Eighth

Circuit. Under Rule 53, the Special Master's authority is premised solely on the order of reference. Fed. R. Civ. P. 53(e)(1). A Special Master has no authority to proceed contrary to the order of reference. Kobrin, as would be required in a Rule 53(e)(2) situation, filed an objection to the Special Master's recommendations by motion to the district court specifically asserting that the Special Master had no authority to act as he did. Since it is the district court's obligation to decide whether the Special Master has acted within his conferred authority and it is the district court that has the ultimate authority to adopt, modify or reject the Special Master's recommendations, Kobrin appropriately and timely raised the issue to the district court in accord with Rule 53(e)(2).

An explicit ruling is needed by this Court that an objection filed with the district court to a Special Master's recommended order is a timely objection to a Special Master's failure to follow the terms of the order of reference.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 12, 1997

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Nancy KOBRIN, Appellant,
v.
UNIVERSITY OF MINNESOTA;
The Regents of the University of Minnesota,
Appellees.

No. 96-2674.

United States Court of Appeals,
Eighth Circuit.

Submitted March 10, 1997.

Decided Aug. 12, 1997.
Rehearing and Suggestion for Rehearing En
Banc Denied Sept. 16, 1997.

Female lecturer sued university for sex discrimination in violation of consent decree requiring university to make good faith effort to hire approximately equally well qualified female candidates. The United States District Court for the District of Minnesota, Paul Magnuson, J., granted university's motion for summary judgment, and lecturer appealed. The Court of Appeals, 34 F.3d 698, remanded. On remand, the District Court adopted special master's report and entered judgement for university. Lecturer appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) lecturer waived objections to appointment of special master by not immediately objecting to appointment; (2) university's failure to recalculate department faculty gender statistics after hiring male failed to show that university's profferred reason for not hiring female

lecturer was pretext for discrimination; and (3) university's inability to produce all documents that it was required to maintain under its own hiring guidelines failed to show that university did not act in good faith.

Affirmed.

[1] FEDERAL CIVIL PROCEDURE 1875.1
170Ak1875.1
Ordinarily, when party fails to object in timely manner to appointment of special master, objection is waived.

[2] FEDERAL CIVIL PROCEDURE 1875.1
170Ak1875.1
If litigant waits to object to appointment of special master until after that special master files unfavorable report, any objections to appointment of that special master are particularly unpersuasive.

[3] FEDERAL CIVIL PROCEDURE 1875.1
170Ak1875.1
Lecturer suing university for sex discrimination, pursuant to consent decree, waived objections to appointment of special master by not immediately objecting to appointment; lecturer objected only after special master filed unfavorable report.

[4] CIVIL RIGHTS 377.1
78k377.1
In Title VII case in which employee does not present direct evidence of illegal discrimination, employee has initial burden of establishing prima facie case. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[5] CIVIL RIGHTS 🔑 378
78k378
Once employee establishes prima facie case under Title VII, there is presumption that employer committed illegal discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[6] CIVIL RIGHTS 🔑 378
78k378
If employee establishes prima facie case of illegal discrimination under Title VII, it falls to employer to rebut resulting presumption of discrimination by producing legitimate, nondiscriminatory reason for its actions. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[7] CIVIL RIGHTS 🔑 378
78k378
If employer proffers legitimate, nondiscriminatory reason for its actions, presumption of illegal discrimination in violation of Title VII has been rebutted and it falls to employee to prove that proffered reason is mere pretext. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[8] CIVIL RIGHTS 🔑 378
78k378
Notwithstanding presumption of discrimination that arises after employee establishes her prima facie case under Title VII, employee retains, at all times, the ultimate burden of persuading trier of fact that defendant intentionally discriminated against her. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[9] FEDERAL CIVIL PROCEDURE 2397.6
170Ak2397.6
Female lecturer established prima facie case of gender discrimination, under consent decree obligating university to hire approximately equally well qualified female candidate when percentage of women in hiring pool is greater than percentage of women at level in department for which candidate is sought, by showing that she was member of protected class, she was qualified for position for which university was accepting applications, she was denied position, and university hired male candidate for position.

[10] FEDERAL CIVIL PROCEDURE 2397.6
170Ak2397.6
University rebutted presumption of gender discrimination, created by female lecturer's prima facie case under consent decree obligating university to hire approximately equally well qualified female candidate when percentage of women in hiring pool was greater than percentage of women at level in department for which candidate was sought, by stating as its legitimate, nondiscriminatory reason for hiring male candidate that male candidate was most qualified candidate for position.

[11] FEDERAL CIVIL PROCEDURE 2397.6
170Ak2397.6
University's failure to recalculate department faculty gender statistics after hiring male failed to show that university's proffered reason for not hiring female lecturer was pretext for discrimination in violation of consent decree obligating university to hire approximately equally well qualified female candidate when percentage of women in hiring pool was greater than percentage of women at level in department for which candidate was sought; professors on search committee testified that lecturer's application was weaker than applications of several other candidates, both male and female.

[12] FEDERAL COURTS 🔑 776
170Bk776
Court of Appeals reviews district court's conclusions of law de novo and its findings of fact under clearly erroneous standard.

[12] FEDERAL COURTS 🔑 850.1
170Bk850.1
Court of Appeals reviews district court's conclusions of law de novo and its findings of fact under clearly erroneous standard.

[13] CIVIL RIGHTS 🔑 141
78kl41
It is inappropriate for court hearing civil rights claims against university to sit as super personnel council to review tenure decisions.

[14] CIVIL RIGHTS 🔑 377.1
78k377.1
Court hearing civil rights claim against university accords high degree of deference to judgment of university decision-makers regarding candidates' qualifications for academic positions.

[15] CIVIL RIGHTS 🔑 382.1
78k382.1
To prevail on civil rights claim against university, plaintiff must show something more than mere dispute over her qualifications for position; indeed, in tenure context, plaintiff's evidence of pretext must be of such strength and quality as to permit reasonable finding that denial of tenure was obviously unsupported.

[16] FEDERAL CIVIL PROCEDURE 🔑 2397.6
170Ak2397.6
University's inability to produce all documents that it was required to maintain under its own hiring guidelines failed to

show that university did not act in good faith, as required by consent decree requiring university to make good faith effort to hire approximately equally well qualified female candidates; guidelines were not part of consent decree, unsuccessful female candidate offered no evidence that loss of documents was anything other than inadvertent, and university generally complied with terms of consent decree when it undertook its search to fill faculty position.

[17] FEDERAL COURTS 870.1
170Bk870.1
Whether party acted in good faith, as required by consent decree, is factual determination that court of appeals reviews under clearly erroneous standard.

***410** Kay Nord Hunt, Minneapolis, MN, argued (Stephen C. Rathke, Minneapolis, MN, on the brief), for appellant.

Julie Fleming-Wolfe, St. Paul, MN, argued, for appellee.

Before WOLLMAN, JOHN R. GIBSON, and MAGILL, [FN1] Circuit Judges.

FN1. The Honorable Frank J. Magill was an active judge at the time this case was submitted and assumed senior status on April 1, 1997, before the opinion was filed.

MAGILL, Circuit Judge.

We revisit this sex discrimination case as Nancy Kobrin appeals from the district court's [FN2] order that both adopted the special master's [FN3] findings of fact as well as granted judgment in favor of the defendant, the University of Minnesota (University). Kobrin argues that the district court's order should be reversed for any one of the following three

reasons: (1) she was entitled to have a hearing before a panel of three persons rather than the special master alone; (2) the special master applied the wrong legal standard when reviewing Kobrin's claim; and (3) the University was unable to produce all of the documents that the University is required to maintain under its own hiring guidelines. We affirm.

FN2. The Honorable Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota.

FN3. Special Master Leonard E. Lindquist.

I.

In 1980, the University settled a class action sex discrimination suit, Rajender v. University of Minnesota, No. 4-73-435 (D.Minn. Aug. 13, 1980), by entering into a consent decree. Under the terms of the Rajender consent decree, the University must conduct a nationwide search to fill any academic, non-student position. The University must also make a good faith effort to hire "approximately equally well qualified" female candidates under an affirmative action plan until the percentage of women employed at all levels within a University department equals the percentage of women available for hiring. Rajender Consent Decree at 3-4. To comply with this requirement, the University annually compiles faculty gender statistics of the percentage of women employed at each level within each department of the University. As part of its good faith effort, the University has written hiring guidelines for each department. The hiring guidelines require each department to keep extensive records of its hiring process. These hiring guidelines, however, are not part of the Rajender consent decree.

Kobrin became a Ph.D. candidate in the University's Department of Comparative Literature (Department) in 1978.

She also pursued psychoanalytical training as an advanced research fellow at the Institute for Psychoanalysis in Chicago. Before receiving her Ph.D. in comparative literature from the University in 1984, Kobrin served as the ***411** Acting Program Director for the University's Center for Humanistic Studies (CHS). [FN4]

> FN4. The CHS was an interdisciplinary center established by the College of Liberal Arts to promote research in the humanities.

After Kobrin received her Ph.D. in 1984, she applied, interviewed, and was selected for the position of CHS Program Coordinator. This selection process complied with the provisions of the Rajender consent decree. The position of CHS Program Coordinator was a nontenured, year-to-year position that Kobrin held until 1988. In addition to her duties as CHS Program Coordinator, Kobrin also taught some classes for the Department. In 1988, however, the University closed the CHS. Consequently, Kobrin's position as CHS Program Coordinator was eliminated.

Around the same time, two professors resigned from the Department. On the recommendation of one of the resigning professors, the University hired Kobrin as a lecturer [FN5] for the Department. Kobrin's position as a lecturer for the Department was funded by a "soft money fund," a type of University grant given to a department for a specific purpose on an annual basis. Kobrin was notified that her job would last from September 16, 1989, through June 15, 1990.

> FN5. The term "lecturer" applies to non-permanent, non-tenure track teaching positions. These positions can involve some administrative duties as well.

After Kobrin was hired as a lecturer, the University informed Kobrin that the creation of the lecturer position for which she had just been hired triggered the need for a search pursuant to the Rajender consent decree. Kobrin objected to the need for a Rajender search, arguing that she did not occupy a newly created position because the position was not substantially different from her previous position as CHS Program Coordinator. The deans of the Department disagreed with Kobrin and decided that a Rajender search was necessary because, in their opinion, Kobrin's new position was materially different from her old one. By the time the deans had made this decision, however, there was not enough time to conduct a Rajender search prior to the start of the academic year. Therefore, Kobrin was allowed to keep her position as a Department lecturer for one year. However, the University's Equal Opportunity Office made it clear to the Department that Kobrin could not continue in her position as lecturer unless she was selected for that position in the course of the Rajender search that would be conducted before the start of the next academic year.

To conduct a Rajender search, the Department must first form a search committee. The committee's job is to make a final selection for the advertised position based on characteristics such as a candidate's training, his or her experience, the quality and quantity of a candidate's published works, and the academic recommendations submitted on behalf of each candidate. If a Rajender search results in the hiring of a male candidate, the search committee must list the three most qualified women who were considered and document the committee's reasons for not hiring one of these women.

In 1988, the Department approved funding for a new senior faculty position and a new junior faculty position. Both of these were tenure-track positions. To fill the two positions, the Department formed a search committee of three women

and four men and then advertised for candidates with a solid background in critical theory and a background in at least one of the following areas: literature with an emergent critical interest, continental European critical interest, continental European literature of a period after 1600, or media studies. About one hundred people applied to the Department for the junior faculty position, including Kobrin. The search committee narrowed this pool to a group of about fifteen candidates, which included Kobrin. The search committee further narrowed the pool of candidates to a group of approximately three finalists. Kobrin, however, was not chosen as a finalist because, in the opinion of the search committee, there were several other candidates that were better qualified than she.

Ultimately, the search committee selected a male, Prabhakara Jha, for the junior faculty position He had a strong background in literature with an emergent critical interest. ***412** For the senior position, the search committee selected a candidate who ultimately declined the offer. Finding no other suitable candidates for the senior position, the committee received permission from the University to hire a second junior faculty member instead. Before filling this position, the University did not recalculate the Department's faculty gender statistics for the junior faculty level, even though the hiring of professor Jha was likely to have changed the percentage of males and females at that level within the Department. The committee finally selected Peter Canning to fill the second junior faculty position. The chair of the search committee informed Kobrin of the committee's decision by mail in July 1989.

After receiving news of the search committee's decision, Kobrin asked for the documents that the Department is required to create under its own hiring guidelines. The Department was able to produce some, but not all, of these documents.

Kobrin filed a Rajender sex discrimination claim against the University in the district court. [FN6] In her complaint, Kobrin alleged that the Department had discriminated against her based on her sex when it failed to hire her for the second junior faculty position. The University subsequently elected not to renew Kobrin's lecturer position. Kobrin then filed a second Rajender claim against the University in the district court, this time alleging that she was terminated in retaliation for having filed her first claim.

> FN6. As we previously explained in Kobrin v. University of Minnesota, 34 F.3d 698 (8th Cir.1994) (Kobrin I), "[s]ex discrimination claims against the University are brought under the Rajender consent decree, but Title VII [of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17,] standards still govern the claims." 34 F.3d at 701 n. 2.

Kobrin's sex discrimination and retaliation claims were considered by a special master, who recommended that the district court grant the University's motion for summary judgment on all claims. The district court adopted the recommendation of the special master and granted the University summary judgment. Kobrin appealed the district court's decision to this Court. We affirmed the district court's grant of summary judgment to the University on the retaliation claim. Kobrin v. University of Minn., 34 F.3d 698, 705 (8th Cir.1994) (Kobrin I). However, we found that Kobrin had established a prima facie case of sex discrimination and that there was a genuine issue of fact as to whether the University's proffered reasons for failing to hire Kobrin were mere pretext. Id. at 702-03. Accordingly, we affirmed in part and reversed in part the district court's grant of summary judgement, and remanded the case for further proceedings. Id. at 705.

On remand, the district court appointed special master Leonard E. Lindquist to hear Kobrin's case. The special master held a hearing on Kobrin's sex discrimination claim from April 3, 1995, through April 7, 1995. Although Kobrin was entitled to a hearing in front of a three-person panel under the terms of the Rajender consent decree, at no time before or during the hearing did Kobrin object to the fact that the special master was presiding by himself, nor did Kobrin ever assert before the special master her right to a three-person panel. During this time, Kobrin's counsel was an attorney who was simultaneously representing several other claimants suing the University pursuant to the Rajender consent decree.

After the conclusion of the hearing, the special master wrote an extensive, twenty-eight page report detailing his findings of fact with respect to Kobrin's claims. The special master first recounted the steps that the University had taken in deciding whom it would hire for the second junior faculty position. The special master then found that the Department did not discriminate against Kobrin on the basis of her gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17, when it declined to hire Kobrin. The special master also found that the Department's failure to hire Kobrin did not violate the affirmative action hiring plan outlined by the Rajender consent decree.

After the special master filed his unfavorable report, Kobrin objected to the special master's findings in the district court. Kobrin objected on the grounds that: (1) she was ***413** entitled to a hearing in front of a three-person panel instead of just the special master; (2) the special master had applied the wrong legal standard when he reviewed Kobrin's claim; and (3) the University was unable to produce all of the documents related to the hiring process that the University is required to maintain under its own hiring guidelines.

The district court adopted the special master's findings of fact and entered judgment for the defendants. Kobrin appeals to this Court.

II.

Kobrin argues that the decision of the district court should be reversed because she was entitled to a hearing in front of a three-person panel rather than only a special master. We disagree.

[1][2] Ordinarily, when a party fails to object in a timely manner to the appointment of a special master, the objection is waived. See Burlington Northern R.R. Co. v. Department of Revenue of Washington, 934 F.2d 1064, 1069 (9th Cir.1991); see also First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas and Elec. Co., 245 F.2d 613, 628 (8th Cir.1957) ("Failure to make [a] timely objection to the appointment of a [special m]aster either at the time of the order [appointing the special master] or promptly thereafter constitutes a waiver of error and objections...."). Moreover, where a litigant waits to object to the appointment of a special master until after that special master has filed an unfavorable report, any objections to the appointment of that special master are particularly unpersuasive. See Burlington Northern, 934 F.2d at 1069.

[3] In the instant case, Kobrin did not immediately object to the appointment of the special master but instead sat on her rights throughout the five-day period during which the special master conducted the hearing. Furthermore, Kobrin did not object to the special master's appointment until after the special master filed his unfavorable, twenty-eight page report. Finally, given Kobrin's counsel's experience in litigating Rajender claims, Kobrin's counsel almost certainly was aware of Kobrin's right to a three-person panel. Nevertheless, Kobrin did not assert her right to be heard by a three-person

panel in a timely manner. Based on these factors, we hold that Kobrin waived her right to a three-person panel.

III.

Kobrin argues that, although the University has offered a legitimate, nondiscriminatory reason for not hiring her, the University's failure to recalculate the Department faculty gender statistics proves that the University's proffered reasons for hiring Canning instead of her were mere pretext for engaging in sex discrimination. According to Kobrin, the district court erred when it did not conclude that the University's failure to recalculate the faculty gender statistics constitutes proof of pretext. More specifically, Kobrin argues that the district court erred when it accepted the University's assessment of Kobrin's qualifications and the University's argument that, even if the University were obligated to recalculate the faculty gender statistics, Kobrin would not have been hired. Kobrin argues that the district court was instead required to make an independent review of her qualifications for the junior faculty position. We disagree.

[4][5][6][7][8] In a Title VII case in which a plaintiff does not present direct evidence of illegal discrimination, the plaintiff has the initial burden of establishing a prima facie case. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506, 113 S.Ct. 2742, 2746-47, 125 L.Ed.2d 407 (1993). Once the plaintiff establishes a prima facie case, there is a presumption that the employer committed illegal discrimination. Id. If the plaintiff establishes a prima facie case of illegal discrimination, then it falls to the defendant to rebut the resulting presumption of discrimination by producing a legitimate, nondiscriminatory reason for the defendant's actions. Id. at 506-07, 113 S.Ct. at 2746-47. When the defendant proffers a legitimate, nondiscriminatory reason for its actions, the presumption of illegal discrimination has been rebutted and it falls to the

plaintiff to prove that the proffered reason is mere pretext. Id. at *414 507, 113 S.Ct. at 2747. Notwithstanding the presumption of discrimination that arises after the plaintiff establishes her prima facie case, the plaintiff retains, at all times, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff...." Id. (quotations, citation, and alteration omitted).

[9][10][11] We have already held in Kobrin I that Kobrin established a prima facie case against the University. 34 F.3d at 702. Kobrin has shown that (1) she is a member of a protected class; (2) she was qualified for the position for which the University was accepting applications; (3) she was denied the position; and (4) the University hired a male candidate, Peter Canning, for the position. Id. The University has, however, rebutted the presumption, created by Kobrin's prima facie case, by stating as its legitimate, nondiscriminatory reason for hiring Canning instead of Kobrin that Canning was the most qualified candidate for the junior faculty position. Id. at 703. This case thus turns on the issue of whether Kobrin can offer sufficient proof that the University's stated reason for not hiring her was mere pretext. Id.

Under the Rajender consent decree, the University is obligated to hire an approximately equally well qualified female candidate when the percentage of women in the hiring pool is greater than the percentage of women at the level in the Department for which a candidate is sought. Rajender Consent Decree at 3-4. The University, however, did not recalculate the faculty gender statistics after professor Jha was hired for the junior faculty position. Kobrin asserts that, had the University recalculated the faculty gender statistics, the University would have been required, pursuant to the Rajender consent decree, to hire an approximately equally well qualified female candidate for the second junior faculty position. Kobrin further asserts that the University's decision not to recalculate the faculty gender statistics proves that the

University's proffered reason for not hiring Kobrin was mere pretext for engaging in sex discrimination.

The district court rejected Kobrin's proof of pretext because the district court had already accepted the University's conclusion that Kobrin was not an approximately equally well qualified female candidate. Mem. Op. (May 7, 1996) at 9. Accordingly, the district court reasoned that the University's failure to recalculate the faculty gender statistics could not be proof of pretext because, even if the University had recalculated the faculty gender statistics, the University would not have been obligated to hire Kobrin since she was not an approximately equally well qualified candidate. Kobrin, however, argues that the district court should have independently assessed Kobrin's qualifications rather than relying on the University's findings.

[12][13][14][15] This Court reviews a district court's conclusions of law de novo and its findings of fact under the clearly erroneous standard. Sawheny v. Pioneer Hi-Bred Int'l, Inc., 93 F.3d 1401, 1407 (8th Cir.1996). Moreover, it is inappropriate for a court to "sit as a super personnel council to review tenure decisions." Brousard-Norcross v. Augustana, College Ass'n, 935 F.2d 974, 976 (8th Cir.1991) (quotations omitted). As we explained in Kobrin I, we

> accord a high degree of deference to the judgment of university decision-makers regarding candidates' qualifications for academic positions. To prevail, the plaintiff must show something more than a mere dispute over her qualifications for the position. Indeed, in the tenure context, for example, the plaintiff's evidence of pretext must be of such strength and quality as to permit a reasonable finding that the denial of tenure was obviously unsupported.

34 F.3d at 704 n. 4 (quotations, alteration, and citations omitted).

The district court's finding that Kobrin was not an approximately equally well qualified candidate was not clearly

erroneous. The record contains ample evidence to support the district court's conclusion. For example, the professors on the search committee testified that Kobrin's application was weaker than the applications of several other candidates, both male and female. Professor Ronald W. Sousa, a member of the search committee, testified that Kobrin was at the bottom of the semifinalist list, not the top. Mem. Op. and Rec. Or. (Feb. 28, 1996) at 16 ***415** (Special Master). Professor Nancy Armstrong, another member of the search committee, testified to being underwhelmed by Kobrin's candidacy and specifically noted that she did not find Kobrin to be an approximately equally well qualified candidate. Id. at 17. Finally, professor Rey Chow, also a member of the search committee, testified that not only was Kobrin "not good enough for the department," but also that there were other, better qualified female candidates who had applied for the junior faculty position. Id.

Furthermore, Kobrin was not one of the candidates that the University listed as the three best qualified women candidates, a listing that was required by the Rajender consent decree. As a result, there were at least three women that the University found to be more qualified than Kobrin.

Based on the district court's findings, which are fully supported by the record, it is apparent that Kobrin was not an approximately equally well qualified candidate. Thus, even if the University had recalculated the Department faculty gender statistics, Kobrin would not have been hired for the second junior faculty position. Accordingly, the University's failure to recalculate the Department faculty gender statistics is not sufficient proof of pretext in these circumstances.

IV.

[16] Finally, Kobrin argues that the decision of the district court must be reversed because the University was unable to

produce all of the documents that the University is required to maintain under its own hiring guidelines. Kobrin asserts that this demonstrates the University's lack of good faith, a violation of the Rajender consent decree. We disagree.

[17] The determination of whether a party has acted in good faith is a factual determination that we review under the clearly erroneous standard. Cf. McMahon Food Corp. v. Burger Dairy Co., 103 F.3d 1307, 1313 (7th Cir.1996) ("A trial court's conclusion that a party failed to act in good faith [in the context of a commercial case] is a finding of fact which we reverse only for clear error."); Cramer v. Commissioner, 64 F.3d 1406, 1415 (9th Cir. 1995) ("The Tax Court also found that appellants did not act in good faith. We review this finding of fact for clear error."), cert. denied, --- U.S. ---, 116 S.Ct. 2499, 135 L.Ed.2d 190 (1996); United States v. Singer, 785 F.2d 228, 234 n. 6 (8th Cir.1986) (reviewing the trial court's determination of good faith for clear error in the context of a criminal case).

Under the terms of the Rajender consent decree, the University was only required to make a good faith effort to hire approximately equally well qualified female candidates. Rajender Consent Decree at 3-4. The University's hiring guidelines are not part of the Rajender consent decree. As a result, that the University was not able to produce all of the documents it is supposed to maintain under its own hiring guidelines was not, by itself, a per se violation of the Rajender consent decree.

Furthermore, the district court's finding that the University had conducted the Rajender search in good faith is not clearly erroneous. With respect to the missing documents, the special master specifically found that "[t]here is not one iota of evidence to support a finding that these [missing] documents were intentionally destroyed, nor is there any indication that the documents contained information contrary to the testimony of the three search committee members...." Mem.

Op. and Rec. Or. at 20-21. Kobrin herself has offered no evidence that the loss of some of the documents was anything other than inadvertent. Given the University's general compliance with the terms of the Rajender consent decree when it undertook its search to fill the junior faculty position, the University's failure to maintain every single document required by the University's hiring guidelines is not enough to compel the conclusion that the University failed to act in good faith.

V.

For the foregoing reasons, we affirm.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Shyamala Rajender, on behalf of herself and a class of female academic non-student employees and applicants at the University of Minnesota,

Plaintiff,

v.

The University of Minnesota and the Regents of the University of Minnesota,

Defendants.

Civil File No. 4-89-810

Claim of Nancy Kobrin
Special Masters No. 293

MEMORANDUM AND ORDER

This matter is before the Court upon Plaintiff's Motion to Reject or Modify Special Master Lindquist's Findings of Fact, Conclusions of Law, and Recommended Order for Judgment dated February 28, 1996. For following reasons, Plaintiff's motion is denied.

I. BACKGROUND

The factual background of this case has been outlined by the Eighth Circuit in Kobrin v. University of Minnesota, 34 F.3d 698 (8th Cir. 1994). Therefore, this Court will not recount the factual predicate underlying this case. In Kobrin, the Eighth Circuit held that Plaintiff's sex discrimination claims survived summary judgment. Plaintiff's sex discrimination claims were heard in front of Special Master Leonard

Lindquist from April 3 to April 7, 1995. Plaintiff brought claims alleging that Defendant had discriminated against her on the basis of sex in violation of Title VII and the consent decree entered into as a result of Rajender v. University of Minnesota, No. 4-73-435 (D. Minn. Aug. 13, 1980). The Special Master filed a recommended order for judgment in Defendant's favor. Plaintiff appeals that recommended order.

II. STANDARD OF REVIEW

This Court is authorized to engage in de novo review of the Special Master's legal findings, see Minnesota Mining & Manufacturing v. Johnson & Johnson Orthopaedic, Inc., 1991 WL 340579 at *3 (D.Minn.), and "shall accept the master's findings of fact unless clearly erroneous." See Fed. Civ. P. 53. Under this standard, a decision of the special master should be affirmed if there is substantial evidence in the record to support the decision. U.S. v. Clapp, No. 94-1928, 1995 WL 34275, at *3 (8th Cir. Jan. 31, 1995). "A factual finding by a Master is not 'clearly erroneous' unless it stems from a mistaken view of law or unless, although it be supported by circumstantial evidence, the court is entirely convinced after a consideration of the evidence that a mistake has been made." In re Arkansas Communities, Inc., 33 B.R. 800, 808 (D.C. Ark. 1983), aff'd, 741 F.2d 185 (8th Cir. 1984).

III. DISCUSSION

Plaintiff argues that Special Master Lindquist made erroneous factual findings regarding her Rajender and Title VII claims and applied the wrong legal standard in addressing her claims under the Rajender consent decree ("Consent Decree").

A. Title VII Claim

Plaintiff alleges that the Special Master incorrectly accepted Defendant's proffered reasons for not hiring Plaintiff. Plaintiff does not challenge the Special Master's application of the law. Plaintiff recognizes that under Title VII, once Defendant offered a legitimate, non-discriminatory reason for its decision to hire someone other than Plaintiff, Plaintiff had the burden of demonstrating that the Defendant's reasons were pretext for illegal discrimination. See St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2746 (1993). Plaintiff argues that the Special Master clearly erred when he accepted Defendant's reasons for choosing not to hire Plaintiff.

Plaintiff contends that she was equally well-qualified for the position of assistant professor -- the position eventually filled by Peter Canning through the second junior professor search. Plaintiff contends that her credentials "exceeded [Canning's] in every relevant category." Plaintiff's Memorandum in Support of Motion, p.22. She contends that she had more teaching and advising experience than Canning, that her publications were more numerous and appeared in more prestigious journals, and that "her mastery of the field of literature and psychoanalysis [were] beyond dispute." Id.

Plaintiff also cites to the Eighth Circuit opinion in Kobrin v. University of Minnesota, 34 F.3d 698, 703 (8th Cir. 1994), in which the Circuit expresses skepticism over the University's stated reasons for hiring Canning. The court found that there was "sufficient evidence to create a genuine issue of fact as to pretext here." Id. The court also stated that it believed the University's explanations for hiring Canning had shifted over time, and that such evidence could support a finding of pretext. Id.

While the Eighth Circuit found that Plaintiff had sufficient evidence to survive summary judgment, such a finding does not indicate that Plaintiff would prevail at trial. While Plaintiff may have presented evidence to question the proffered reasons

of the University, there is sufficient evidence in the record to support the Special Master's findings and to preclude this Court from concluding that those findings are clearly erroneous.

Special Master Lindquist heard the testimony of Professor Sousa, head of the Comparative Literature Department's search committee, and the testimony of Professors Armstrong and Chow who were also on the search committee. Special Master Lindquist accepted their testimony that members of the search committee had read Plaintiff's scholarly work and found it weaker than that of other candidates. Members of the committee also felt that Plaintiff's background showed a "lack of professional engagement." Report and Recommendation, p.16. Special Master Lindquist believed the testimony of Professors Chow and Armstrong that Plaintiff ranked in the bottom two or three of the approximately fifteen semi-finalists because her qualifications were not as strong as others. Id.

Plaintiff argues that the Special Master erroneously ignored the testimony of Professor Wladyslaw Godzich who supported her claims. However, the Special Master accepted the testimony of Department Chair Schulte-Sasse and members of the search committee who refuted Professor Godzich's testimony. Determining which testimony is ultimately more persuasive is the role of the fact-finder. Cf. Fed. R. Civ. P. 52(a). When the testimony of witnesses conflicts, it is role of the Special Master role to decide which opinions he finds more credible. After hearing the witnesses, the Special Master did not find Professor Godzich persuasive.

Plaintiff asks this Court to compare the resumes of Plaintiff and Peter Canning, the person hired for the position. Plaintiff asks to Court to consider the fact the Plaintiff had her Ph.D. before Canning and also had more scholarly publications and teaching experience. Both the Eighth Circuit and the Special Master recognized that courts should "accord a high degree of deference to the judgment of university decision

makers regarding candidates' qualifications for academic positions." Kobrin, 34 F.3d at 704 n. 4 (citations omitted); Report & Recommendation of the Special Master, p. 18-19. While Plaintiff may have had her Ph.D. longer, or had more publications than Canning, such factors are not definitive. Search committee members read the written work of the candidates, and could certainly have found, as they did, that at an early stage of his academic career, Mr. Canning's work exhibited more promise. The Special Master's findings were not clearly erroneous in regard to accepting the University's reasons for hiring Mr. Canning.

As further evidence that the University's actions were pretextual, Plaintiff argues that the University changed its justification for hiring new faculty over time. However, there is evidence in the record that the search committee continued its commitment to hire someone with expertise in critical theory and continental European literature after 1600. While Canning and Plaintiff shared some academic interest in psychoanalysis, the search committee wanted someone with a broader background. As Professor Sousa said,

> What we were looking for was people who did an ensemble of critical kinds of studies that you could call Critical Theory, and had some set of interrelationships between them. In fact, if a person did only Psychoanalysis in a very concentrated sense, it probably would have been a negative because we were trying to see how people related across a range of things.

Sousa, tran. p. 725. Professor Canning's expertise in French literature filled a need for a specialist in European literature. While such a need was not stated in the Department's Planning Statement, the Special Master was within his power to accept the testimony of Professor Schulte-Sasse, the Department

Chair, and Professor Sousa, that the Planning Statement was not meant to bind the search committee and that the job description clearly described the areas to be filled. There is sufficient evidence in the record to support the Special Master's findings that the University's proffered reasons were not pretextual.

Plaintiff also suggests that the Special Master should have drawn adverse inferences from the fact that Defendant could not produce notes and papers compiled during the search process. Plaintiff argues that their absence should have been construed as evidence of pretext on the part of the University. While the Special Master could have found that the failure of the Defendant to produce such records raised an unfavorable inference, such an inference was not required. Boyd v. Ozark Air Lines, Inc., 568 F.2d 50, 53 (8th Cir. 1977). Even where such an inference is raised, the inference is rebuttable by evidence that appropriate factors were the true reasons behind the employment action. Id. The Special Master found that there was no evidence that any member of the University actually destroyed documents. The Special Master found that the search committee was motivated by appropriate motives and that the loss of the records, while unfortunate, did not demonstrate pretext on the part of the University. This Court cannot say that such a finding was clearly erroneous. Therefore, this Court denies Plaintiff's motion with respect to her Title VII claims.

B. "Rajender" Claims

1. Consent Decree

The Consent Decree entered into as a result of the class action filed against the University in Rajender v. University of Minnesota, provides the forum for addressing sexual discrimination claims against the University of Minnesota.

The Decree requires that for litigants under the Consent Decree, "respective burdens of proof shall be those placed on litigants in civil actions under Title VII." Consent Decree, II.D.8. However, the Decree also states that if the burden of moving forward shifts to the University, the University must demonstrate that it followed the procedures outlined in the Decree in good faith. Id. While the burdens of the parties are those under Title VII, it is clear that the Consent Decree imposes additional obligations on the University.

The Decree requires the University to calculate statistics regarding the pool of available women candidates for any position it offers. Id. at I.E.4. Those statistics determine whether or not certain requirements are triggered, e.g. how widely the University must advertise, whom it must notify, etc. In addition, if the statistics bear certain relationships to the percentage of women in the hiring department, the department is required to give preference to approximately equally qualified women candidates. Plaintiff did not challenge the statistics used by the Department for the first junior hire. Plaintiff challenges the finding of the Special Master that the University was not required to re-calculate statistics before the second hire of a junior professor.

Plaintiff raises two challenges to the legal findings of the Special Master. First, Plaintiff contends that under the Consent Decree itself, the University was obligated to recalculate statistics before making the second hire. Plaintiff contends that once Professor Jha was hired for the first tenure-track position, the University was obligated to re-calculate statistics regarding the percentage of women in the Department in tenure-track positions, and presumably for the pool of available women candidates as well. The University correctly points out that the Decree states that the statistics for use in hiring searches need only be issued on an annual basis before department hiring searches. Consent Decree, I.E.4.

This Court agrees with the University that for calculations regarding the pool of available candidates, such calculations probably need only be done on an annual basis. However, this Court is skeptical of whether calculating the percentage of women in any University of Minnesota Department need only be done annually. Such an interpretation would permit departments with only one female professor and no male professors to hire an unlimited number of men in one year without regard to the Consent Decree. It seems unlikely that the University should avoid its own affirmative action policies by ignoring calculations that are obvious to the naked eye.

However, this Court need not decide this issue. Even if the hiring of Professor Jha changed the percentage of women in the department in tenure-track positions so that a preference for an equally qualified female was required, Plaintiff still would not have been afforded a preference. The University's policy has been to regard "approximately equally qualified" candidates as those who make the final round for selection. In this case, Plaintiff did not make the final round. As discussed above, the Special Master accepted the Defendant's reasons for not making Plaintiff a finalist and not offering Plaintiff the position. There is sufficient support in the record for the Special Master's findings.

2. Hiring Guide

Plaintiff also claims that the requirements of the Consent Decree included the Hiring Guide adopted by the University and the Department of Comparative Literature. This Guide required all departments in the College of Liberal Arts, including the Department of Comparative Literature, to give hiring preference to equally qualified females, without regard to statistical comparisons.

The Hiring Guide adopted by the College of Liberal Arts is not part of the Consent Decree. The Consent Decree clearly

envisions statistical comparisons and only requires preferences when statistical comparisons of the available pool of women and the percentage of women in a department warrant such preferences. Because the Hiring Guide is not part of the Rajender Consent Decree, this Court adopts the legal conclusions of the Special Master with regard to Plaintiff's Rajender claims.

C. Special Master Hearing

Plaintiff argues that the Consent Decree requires that claims be brought in front of a three person panel, rather than merely the single special master system that has been adopted through practice. Plaintiff is correct that the Decree provides for such a panel. However, Plaintiff went through a summary judgment hearing, brought appeals to both this Court and the Eighth Circuit, and then conducted a full trial in front of the Special Master. Plaintiff now raises this issue on appeal of the Special Master's decision. Plaintiff never requested such a panel from either the University or the Special Master. In addition, Plaintiff does not demonstrate, nor even claim, that she was prejudiced by such a forum. This Court believes that Plaintiff had ample opportunity to raise her claims at numerous junctures in these proceedings.

In a slightly different context, courts have held that where parties fail to timely object to the appointment of a special master by a district court, such an objection is waived. See Burlington Northern v. Dept. of Revenue, 934 F.2d 1064, 1069 (9th Cir. 1991); Cruz v. Hauck , 515 F.2d. 322, 331 (5th Cir. 1975), cert. denied, 424 U.S. 917 (1976). Courts have found objections waived where litigants objected after the special master filed an unfavorable report. Burlington, 934 F.2d at 1069; Jenkins v. Sterlacci, 849 F.2d 627, 634 (D.C. Cir. 1988); Hill v. Duriron Co., 656 F.2d 1208, 1213 (6th Cir. 1981). As both the Sixth and Ninth Circuits noted,

> To permit such objections after the [master] makes his findings and recommendations would certainly not serve the cause of judicial economy. Parties who did not prevail before the [master] would routinely seek to have the reference set aside for reasons that either could have been corrected or would have stopped the proceedings if promptly brought to the referring court's attention.

Burlington, 934 F.2d at 1069-70, quoting Hill, 656 F.2d at 1213. This Court agrees with this reasoning. Because Plaintiff failed to raise any concerns regarding the Special Master, this Court finds that Plaintiff waived her right under the Decree to a three person panel.

IV. CONCLUSION

There is sufficient evidence in the record to support the Special Master's finding that the University adequately considered Plaintiff's qualifications and legitimately found Peter Canning the most qualified and appropriate candidate for the junior professor position. Therefore, this Court adopts the Special Master's findings for Defendant on Plaintiff's Title VII claims. In addition, there is sufficient evidence in the record to support the Special Master's findings that Defendant complied with the requirements of the Rajender Consent Decree. This Court adopts the Special Master's findings on Plaintiff's Rajender claims. In addition, this Court finds that Plaintiff was not prejudiced by presenting her claims in front of a single special master rather than a three person panel and that Plaintiff waived her right to a three person panel.

Based on review of the record and the submissions of the parties, the Court concludes that Special Master Lindquist's findings are not clearly erroneous. After reviewing the

transcripts of the trial, this Court is satisfied that there is substantial evidence in the record to support the findings of Special Master Lindquist. The Court ADOPTS the Report and Recommendation (Clerk Doc. No. 26).

Accordingly, **IT IS HEREBY ORDERED** that

JUDGMENT BE ENTERED FOR DEFENDANTS.

Dated: May 7, 1996.

/S/
Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

	Claim of Nancy Kobrin
Shyamala Rajender, on behalf of herself and a class of female academic non-student employees and applicants at the University of Minnesota,	**MEMORANDUM OPINION AND RECOMMENDED ORDER**
Plaintiff,	
	Civ. No. 4-89-810
v.	**Special Masters No. 293**
The University of Minnesota and the Regents of the University of Minnesota,	
Defendants.	

Nancy Kobrin ("Kobrin") appealed from the district court's order granting the University of Minnesota ("University") summary judgment on Kobrin's Title VII discriminatory treatment and retaliation claims. Kobrin argued that the district court erred in concluding that she failed to produce evidence creating genuine issues of material fact on either claim. The United States Court of Appeals reversed the judgment of the district court as to Kobrin's failure to hire claim, affirmed as to her retaliation claim, and remanded for further proceedings.

The matter now is before the Special Master for trial and Recommended Order. Plaintiff appeared personally and by her

attorney, Stephen C. Rathke, 1800 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402. Defendant was represented by Julie Fleming-Wolfe, 3300 Piper Jaffray Tower, 222 South Ninth Street, Minneapolis, Minnesota 55402.

In support of her claims of discrimination and violation of the Rajender Consent Decree, Kobrin asserts: by failing to hire her for the second position in the junior search conducted by the Department of Comparative Literature (the "Department") in 1989, the University violated the affirmative action provisions mandated by Rajender; moreover, the selection process demonstrated gender-based discrimination prohibited by Title VII -- for this, the University should be required to hire Kobrin in a tenure-track position and compensate her for the loss of pay from 1989 to the date of the award.

Kobrin began the Ph.D. program in the University's Department of Comparative Literature in 1978. Her thesis topic centered on semiotic analysis related to medieval Iberian culture. She also received psychoanalytical training as an advanced research fellow at the Institute for Psychoanalysis in Chicago. Kobrin received her Ph.D. in 1984.

Prior to receiving her Ph.D., Kobrin was recruited to serve as Acting Program Director for the University's Center for Humanistic Studies ("CHS"), an interdisciplinary institute that the College of Liberal Arts ("CLA") established to promote research in the humanities. After receiving her degree, she remained at CHS with a new title, Program Coordinator. To receive that position, she had to apply, interview, and be selected after a search pursuant to the Consent Decree entered into by the University in Rajender v. University of Minnesota, No. 4-73-435 (D. Minn. Aug. 13, 1980), wherein women brought a class action sex discrimination suit against the University, one of the settlement terms being that the University must conduct a nationwide search to fill any academic, non-student position (Rajender

search). In 1987, Kobrin was appointed Director of Graduate Studies for the Department of Comparative Literature; one of the professors testified: "the decision to appoint a person who was not a full-time member of the department, who was in fact not even a full-time teaching faculty member, was taken after considerable reflection and discussion to make sure that the students' interests in both the advising level and the representation and higher council's level would be carried out properly."

Kobrin served in a non-tenured, year-to-year position with CHS, and also taught courses in the Department, until 1988 when CHS closed and Kobrin's position was eliminated. Around the same time, two Department faculty members resigned and, the Department then hired Kobrin as a "lecturer." At the University, the term "lecturer" denotes a non-permanent, non-tenure track teaching position which can involve some administrative duties. Kobrin's lecturer position was funded by a CLA revolving fund of "soft money." Soft money is funds which are granted to a particular department for a particular purpose on an annual basis. Kobrin's position was designated "Professional and Academic" or P & A appointment, which was not on tenure track and did not confer faculty status. Kobrin's last "Notice of Appointment" for the lecturer position stated that her job was to run from September 16, 1989 to June 15, 1990.

When the University first hired Kobrin as a lecturer, it informed her that the change in position triggered the need for a Rajender search. Kobrin objected to the need for a search on the ground that her new position was not substantively different from her CHS position. The deans of the CLA disagreed and concluded that a Rajender search was necessary because her new position was materially different than the old one. The University's Equal Opportunity Office ("EO") then granted the Department an exemption from the search requirement because there was not enough time to conduct a

search before the academic year began. The following year, the Department was granted another exemption by EO and advised that this would be the last exemption for Kobrin's position could not be continued without a search. Meanwhile, in the fall of 1988, the Department received authorization to hire two regular faculty members: a tenured senior professor, and a tenure-track junior professor. Through the joint participation of the Department's faculty members, the Department issued a job description identifying the desired qualifications for the senior and junior positions, reading as follows:

> Doing research and teaching undergraduate and graduate courses in the theory and methodology of literary criticism; solid background in at least one of the following areas: literature with an emergent critical interest, continental European literature of a period after 1600, media studies.

The Department wanted someone with a solid background in critical theory with interest in modern approaches to comparative critical thought to replace the critical theorists they had just lost and the job description reflected that need.

The Department's search for tenure-track faculty was governed by the search requirements of Rajender. Under Rajender, the Department had to refer to the Hiring Plan Supplement ("HPS") for a statistical analysis of women applicants, availability pools and presence in a department. EO annually prepared the HPS for each department within the University. The obligation of a department to hire a woman was driven by the statistics in the HPS. If the HPS showed the availability pool of women was higher than the applicant pool, there were certain advertising requirements with which the department had to comply. If the HPS statistics showed the percentage of female candidates in the availability pool was

higher than the percentage of female faculty in the department, then the department was required to give preference to an approximately equally well-qualified female. If the HPS showed that a preference must be given to an approximately equally well-qualified female, such preference applied only to those candidates referred for final selection.

Departments within the University were required to notify all female Ph.D.s who had received their degree in the three years preceding the search of any openings. When initiating a search, departments were required to provide EO with a Form 16, which documented the criteria for making the cuts from the original applicants to those interviewed and finally selected. Form 16 requested information about minimum qualifications. After completing a search, the Department was required to prepare a Form 17. Form 17 required the Department to list the most seriously-considered women if a male was hired, and to justify not hiring an approximately equally well-qualified female. The signature on the form 17 was provided if EO determined that the search complied with the Rajender requirements.

Professor Schulte-Sasse, Chair of the Department, formed a search committee made up of four men and three women, including Professor Ronald W. Sousa, chair, and department members Nancy Armstrong, Rey Chow, Reda Bensmaia, and Harvey Sarles; and two members from outside the Department, George Lipsitz, and a graduate student, Julie Benz. Professor Armstrong is a well-renowned scholar with considerable experience in promoting women's issues. Prior to her service at the University, Armstrong founded "Committee W" to oversee affirmative action issues at Wayne State University. She is currently chair Professor at Brown University in the Department of Comparative Literature and chair of Brown University's grievance committee overseeing the resolution of cases of sex discrimination and harassment. Professor Chow was hired as an assistant professor in a

tenure-track position in 1987 and about the same time received a post doctoral fellowship for research and teaching on women. Chow tenured early because of her superior credentials and accomplishments.

The search committee was directed to conduct two simultaneous searches: one for the senior position, and another for the junior position. As required under Rajender, a Form 16 identifying any HPS requirements was submitted at the beginning of the search. The HPS statistics did not require that preference be given to any approximately equally well-qualified female. The HPS statistics did, however, result in requirements for special advertising.

In compliance with requirements, Professor Sousa gave written notice of the job posting to all female Ph.D.s who received their degree in the three years before the search. Because Claimant did not fit into that category, she received no formal written notice of the job posting. After consulting with EO, Professor Sousa instructed the Department's secretary to provide Claimant with a copy of the job posting. Claimant applied for the position.

The search committee reviewed 99 applications for the junior position. As a member of the search committee, Professor Chow testified that "we looked at the CV's, looked at the letters of recommendation and at the samples of writing that they provided because we had asked for them. Our evaluation of the candidates was based on our reading of the materials they provided, and also based on our knowledge of the field of comparative literature. In other words, we had to know what the state of the art was in order to see whether the candidates were, indeed, excellent and whether they could, in fact, be of service to us." After initially reviewing the applications, the search committee narrowed the field to about 27 candidates. After meeting several times in January 1989, the search committee narrowed the field to 15 applicants: Susan Bernstein, Peter Canning, Terry Cochrane, Thomas

Cohen, Claudia Crawford, Christine Cullens, Rita Felski, David Graver, Prabhakara Jha, Nancy Kobrin, Reinhard Kruger, Sanford Kwinter, Thomas McCall, Jeremy Tambling, and Anne Tomiche. Of the 15 candidates, the search committee invited Christine Cullens, Rita Felski and Prabhakara Jha for on-campus interviews. The remaining 12 candidates were informed that they could still be considered if the interviews did not lead to satisfactory results.

After the on-campus interviews, Prabhakara Jha was selected as the candidate to be recommended to the Department. The Department offered Jha the position, and he accepted.

The Form 17 submitted after Professor Jha's hiring stated that he would be the first member of the faculty specializing in emergent literature. The Form 17 listed Susan Bernstein, Christine Cullens, Rita Felski as the three most seriously-considered women. EO signed off on the Form 17, indicating that the search conformed to Rajender's requirements. Claimant does not challenge the hiring of Professor Jha and does not claim that she was discriminated against in that search and hiring process.

The search for the senior faculty position resulted in the Department offering the position to Professor Paul Smith; however, when he declined the offer the search committee decided not to offer the position to any other senior faculty candidates. The Department then received permission to hire an additional junior professor out of the original pool of candidates. The search committee for the second junior hire convened in April 1989. Consistent with the procedures for multiple hires, the Department provided EO with another Form 16 that used the same job description for the second hire as for the first hire. Jha's appointment having filled the need for a member of the faculty specialized in emergent literature, a primary focus of the search committee became the hiring of a superior critical theorist. From the former group of 15 semi-

finalists, the search committee selected Peter Canning, Thomas McCall, and Thomas Cohen for on-campus interviews. The Department offered the second junior position to Peter Canning, who accepted. After hiring Professor Canning, the Department submitted another Form 17 to EO. Because this was a consecutive hire, the Department followed the same standards applicable for the first junior hire. Accordingly, the candidates subject to the continuing search were the same as the semi-finalists in place before Professor Jha's hiring. The three most-seriously considered women were the same as in the first hire. EO signed off on the second Form 17, indicating that the search complied with Rajender. Form 17, Summary of the Affirmative Action Process Assuring Equal Employment Opportunity in Academic Appointments, resulting in the appointment of Peter Canning as Assistant Professor, is dated May 30, 1989 and was approved by the University Equal Opportunity Officer on June 1, 1989. As part of Form 17, the search committee sets forth its reasons for selecting Candidate Peter Canning as Assistant Professor as follows:

> Mr. Canning brings with him both wide work in contemporary French writing and also a remarkable critical facility. His appointment would add a dimension -- namely contemporary critical theory -- to a unit that has lost two senior colleagues who were renowned figures in that field. While a number of those of us remaining do work that traverses that field in one way or another, none of us works fully in that area, as does Mr. Canning. Moreover, that area is the one around which we revolve, both in respect to individual scholarly work and in respect to unit curriculum. Mr. Canning was, then, selected very specifically for precisely the profile that he offers and the excellence that he clearly represents within that

field. He will teach our Basic Seminar as well as courses in contemporary French literature and curriculum.

As part of the attachments to Form 17, the search committee presents its reasons for non-selection of women candidates:

> The applicant pool was approximately one-half women, our interview pool slightly greater than one-half, and our final pool two thirds. In short, we saw many women candidates who met baseline criteria. None, however, offered the combination of criteria specified in the position advertisement as well and completely as do the candidates whom we propose here, one of whom is a minority candidate.
>
> Three most seriously-considered women candidates:
>
> Candidate A:
>
> Strong background in areas of social theory and in feminist theory. Specific work in semiotics and in feminism. She would have taught courses in feminist theory and comparative European literature of the eighteenth century to the present. She would not, however, have brought a combined critical sophistication and in-depth expertise in one of the areas targeted in our job description equal to those that the candidate recommended for hire brings.
>
> Candidate B:
>
> Background in modes of textual analysis as well as in psychoanalysis and feminist theory/gender studies. Work in German as well as in English. She would have taught courses in feminist theory and in English-German literary forms of the eighteenth and

early nineteenth centuries, especially autobiography. She would not, however, have brought a combined critical sophistication and in-depth expertise in one of the areas targeted in our job description equal to those that the candidate recommended for hire brings.

Candidate C:

Background in aesthetics, especially Marxist aesthetics, and in literature and the arts. Practical work in those areas as applied to European Romanticism. Work in German and French as well as in English. She would have taught courses in literary genres, aesthetics, and European Romanticism. She would not, however, have brought a combined critical sophistication and in-depth expertise in one of the areas targeted in our job description equal to those that the candidate recommended for hire brings.

Remaining women candidates:

While there were many additional qualified women candidates, the three listed above were, in our judgment, the strongest. The others, to a degree somewhat greater than that of the three applicants reviewed above, were judged not to bring the combination of strengths advertised for.

The Rajender Consent Decree provides that "the respective burdens of proof shall be those placed on litigants in civil actions under Title VII." Consent Decree §II.D.8 (claims), and §III.H.1 (petitions).

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court "established an allocation of the

burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases." St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2746 (1993). McDonnell Douglas announced a three-step process for analyzing such cases. First, the plaintiff must establish a "prima facie" case of discrimination. In sex discrimination cases, the plaintiff makes out a prima facie case by proving: (1) that she is a member of a protected class; (2) that she was qualified for the position for which the employer was accepting applications; (3) that she was denied the position; and (4) that the employer hired a man for the position. See id. at 2747. Establishing a prima facie case creates a presumption that the employer unlawfully discriminated against the plaintiff. In Kobrin v. the University of Minnesota, 34 F.3d 698 (8th Cir. 1994), the Eighth Circuit affirms that for purposes of establishing a prima facie case, the plaintiff need only show her objective qualifications for the job.

Once the plaintiff establishes a prima facie case, the defendant then has the burden of production of articulating a legitimate, nondiscriminatory reason for its employment decision. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2747 (1993). If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted and drops from the case. Id. The plaintiff then has the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision and that sex was. Id. The plaintiff retains the ultimate burden of persuading the trier of fact that she was the victim of intentional discrimination. Id. at 2747-48. Title VII does not require preferential treatment for women. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Three members of the search committee, Professor Sousa, Chair, and department members Professors Armstrong and Chou testified about the charge before them as members of the search committee: their commitment to review the applications

and process them with the mission in mind of dismissing those who did not meet the training and scholarly requirements of the job description; and establishing a semi-finalist pool from which the committee would delineate further those who meet the requirements of the job description through review of training, experience, publications, vitae and academic recommendations. The Special Master found the committee members totally dedicated as the properly instituted authority to select the candidate whose training, writing and experience met the specialized scholarly requirements. The search committee, with the help of the Equal Opportunity Office, performed its duties in complete good faith; there was no issue before the search committee as to which candidate, Professor Kobrin or Professor Canning, should be recommended for appointment because the search committee for reasons wholly unrelated to gender did not advance Kobrin from the semi-finalist candidates to finalist as a woman to be seriously considered for the appointment. Kobrin received very favorable comments for her work in different positions at the University including the Department of Comparative Literature; nonetheless, in looking to her qualifications for the scholarly requirements of the assistant professor position, Professor Sousa testified that after he and Julie Benz, the student representative, read from Dr. Kobrin's work, they reported on their evaluation to the search committee as follows:

> A: Our reporting gist was that it was fairly weak that -- my recollection was that we said something like were Nancy Kobrin's work generally showed some good conceptual rigor and a rather more patent problem in writing.

Explaining the evaluation processes followed by the Search Committee, Professor Sousa testified:

You sum all of those things up, add your own view to it, which that was my view she was in the bottom two or three and if you then take a look at the various vote processes in which she didn't get a vote the elimination processes below that level that would be my conclusion that in general terms, she would have been at the bottom of the list relatively with probably a couple of other people on the same general note.

Excerpts from Professor Armstrong's testimony relating to the evaluation of Dr. Kobrin for the assistant professor position read:

. . . But her CV to me showed as lack of professional engagement . . . And I do not think that clinical -- that Psychoanalysis of the sorts that she practices is a way to become a major figure in Comp Lit in this country. . . .

. . . I felt that she [Kobrin] actually had an advantage in the search, and I was kind of mystified as to why she had an advantage over Terry Cochran who was another in-house candidate for the position. I mean people just seemed to be a lot more concerned with her. And I thought his work was better so this is my view.

Q. Was Nancy Kobrin considered within the committee or by you to be an approximately equally well qualified female?

A. No.

Professor Chow's evaluations of Kobrin's qualifications read:

> A. . . . It was, however, a matter of how good she was in comparison with the other candidates who included women as well as men.
>
> Q. And what was the conclusion that you reached in that regard?
>
> A. That she was good, but she was not good enough compared to the other candidates.
>
> . . . .
>
> Q. Do you know why Nancy Kobrin wasn't interviewed?
>
> A. She was not good enough for the department. . . .
>
> Q. . . . were there female candidates remaining who you would have evaluated as superior to Nancy Kobrin even if she had been interviewed?
>
> A. Yes.

and, Professor Godzich, upon being asked if it was his assessment at the time that this group was capable of making a decision about who would best fill the available position, replied, "I believe so."

While on the witness stand Dr. Korbin was asked:

> Q. Would it be reasonable to conclude that a search committee member could compare -- read your work and compare it to the work of another and come to a conclusion of their own that your

work was not as good as the work of one of the other candidates in the pool?

A. Yes, I suppose they could.

The issue before the Special Master is not whether the job description meets the academic needs of the University or whether the search committee's decision was right or wise, but rather whether the University has articulated a legitimate, non-discriminatory reason for its search and selection of Canning.

In a footnote to its 1994 decision in Kobrin v. the University of Minnesota, 34 F.3d 698 (8th Cir. 1994), the Eighth Circuit explained the position of the judiciary relating to substituting the Court's views for those of the individuals charged with the evaluation duty:

> If the issue of Kobrin's and Canning's relative qualifications in comparative literature had arisen, we note that courts accord a high degree of deference to the judgment of university decision makers regarding candidates' qualifications for academic positions. See Brousard-Norcross v. Augustana College Assn'n., 935 F.2d 974, 976 (8th Cir. 1991) (upholding summary judgment for college in sex discrimination suit and explaining that court "will not sit as a 'super personnel council' to review tenure decisions"); Brown v. Trustees of Boston Univ., 891 F.2d 337, 346 (1st Cir. 1989) ("A court may not simply substitute its own views concerning the plaintiff's qualifications for those of the properly instituted authorities[.]"), cert. denied, 496 U.S. 937 (1990). To prevail, the plaintiff must show something more than a mere dispute over her qualifications for the position. See Molthan v. Temple Univ., 778 F.2d 955, 962 (3d Cir. 1985). Indeed, in the tenure

> context, for example, the plaintiff's evidence of pretext "'must be of such strength and quality as to permit a reasonable finding that the denial of tenure was 'obviously' . . . unsupported.'" Villanueva v. Wellesley College, 930 F.2d 124, 129 (1st Cir.) (citations omitted), cert. denied, 112 S. Ct. 181 (1991); C.F. Odom v. Frank, 3 F.3d 839, 847 (5th Cir. 1993) (explaining that "unless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty").

The College of Liberal Arts Hiring Guide provides that minutes of search committee meetings should be kept. Professor Sousa kept minutes of the meetings. These and other documents, including the resumes and work submitted by the candidates, were retained and available during the search but somehow after the search the documents became misplaced or lost during various moves of professors within the Department resulting in some minutes and other notes not being available for discovery and examination by the plaintiff. There is not one iota of evidence to support a finding that these documents were intentionally destroyed, nor is there any indication that the documents contained information contrary to the testimony of the three search committee members, and the Chair of the Department, Professor Shulte-Sasse.

Plaintiff references the CLA Hiring Guide as the authority and direction for the Special Master determining the scholarly needs of the Department, the candidates who are qualified to fill those academic needs, and when two candidates, male and female, appear to be approximately equally well-qualified, the female candidate is to be given the preference. Plaintiff's written argument asserts, "To establish liability, Kobrin need not prove that the position was denied to her because of her

gender. Instead, Kobrin must establish that her qualifications for the position were approximately equal to Peter Canning. Once that is established, the consent decree obligates the University to give her preference." The Special Master disagrees. The basis for authority and jurisdiction of the Special Master rests with the Rajender Descent Decree and Title VII of the Civil Rights Acts of 1964, as amended. Dr. Kobrin must show something more than a mere dispute over her qualifications for the position. Kobrin, 34 F.3d at 704. As indicated above, the Rajender Consent Decree provides that "the respective burdens of proof shall be those placed on litigants in civil actions under Title VII." Consent Decree §II.D.8 (claims), and §III.H.1 (petitions). The University having met its burden of production for articulating legitimate, nondiscriminatory reasons for its employment decision, then as part of the second step process addressed in McDonnell Douglas, the plaintiff has the opportunity to demonstrate by a preponderance of evidence that the proffered reasons were not the true reasons for the Department's employment decision, and that sex was. Claimant retains this ultimate burden of proving by a preponderance of the evidence that she was the victim of intentional discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. at 255-256; St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. at 2747-48.

Distinguished professors related their experiences as members of the search committee. The Department professors first agreed on the academic needs of the Department following the departure of the two senior professors; they then reached consensus on a job description that reflected those needs; and then they undertook the responsibilities of the search. First, members of the search committee reviewed the submissions of 99 candidates and reduced that candidate pool to about 27, mostly on the basis of lack of the applicant's training or experience in the designated areas of scholarly work and the failure to submit complete data relating to their

publications, etc. After further review and study of the applicant pool, the members of the committee agreed on about 15 semi-finalists. As basis for one of her complaints of discrimination, plaintiff claims that the University was biased against selecting one of its own graduates because of the broader educational background achieved by teaching in another institution; but a member of the search committee refuted that concern by testifying that the Department applicants actually were given special recognition because they were teaching at the University; and in fact three applicants who received their Ph.D.'s at the University were part of the semi-finalist pool. In this search for the second junior hire, the committee again reviewed all documents available relating to the 15 semi-finalists. Some members of the committee met with candidates and as a result of this further review and discussions, the search committee selected three males as finalists for campus interviews at which time the candidates presented themselves and their published works before the faculty and the student body. The three most seriously-considered women of the first junior hire remained candidates for consideration in the second hire. Upon completion of the interviews for the second hire and after further consideration of the three finalists, Peter Canning was recommended for the position of assistant professor and the reasons for his selection were set forth in Form 17 (noted above). Professor Chow voted for one of the other finalists. Other witnesses for the University were Professor Schulte-Sasse, Chair of the Department, and Patricia Mullen, Equal Opportunity Officer for the University, both of whom corroborated the testimony of the search committee members relating to the Rajender requirements as well as their good faith efforts to adhere to the process while selecting the candidates who met the mission of the search.

Before the hearing, the Special Master allowed for an international conference call to depose plaintiff's only witness,

Wlad Godzich, who recited his opinion that Kobrin was better qualified for the assistant professor position of the second hire than Canning, and that after conversations with Prof. Schulte-Sasse, he was of the opinion that the University felt no need for giving preference to a woman. Prof. Schulte-Sasse, upon being examined, characterized Godzich's statements as fabrications, and other professors with whom Godzich conferred reinforced Schulte-Sasse's questions relating to Godzich's credibility. Prof. Godzich was not a member of the search committee, neither was Prof. Schulte-Sasse and even assuming that Prof. Godzich's remarks be accepted as credible, they would not rise to the level of being a credible challenge to the search process or persuasive support for plaintiff's discrimination claims. While Dr. Kobrin was being examined during her deposition, the following colloquy took place relating to the work environment:

Q. Did anybody ever say anything to you that you felt was a sexist comment or that used your gender in a negative way?

A. Yes.

Q. Okay. What?

A. Jochen Schulte-Sasse.

Q. What did he say?

A. When I was working at the Center for Humanistic Studies, one of my tasks was to prepare and organize dinners for the dinner speakers and as we were leaving the faculty club one night he said to me, "Good-night, Mrs. CHS."

Q. And you took that as sexist why?

A. I took it as derogatory and sexist because I was not married to the Center for Humanistic Studies, I was the assistant director, and that it was demeaning to refer to me as Mrs. CHS rather than Dr. Kobrin or Professor Kobrin.

Q. Did Jochen or anybody else ever make any other sexist or derogatory comments that were based on your gender?

A. Not that I can recall.

Having heard the testimony of six witnesses over a period of four days, having reviewed the depositions of three other witnesses, having examined the many exhibits and studied the proposed findings of fact and arguments of counsel, it is hereby concluded:

1. That the University, through the action of the faculty of the Department and the search committee, has sustained its burden of articulating a legitimate, nondiscriminatory reason for its selection of Canning as assistant professor to fill the faculty position in the Comparative Literature Department;

2. That Defendant has proven by the preponderance of the evidence that in filling the faculty position of assistant professor, it followed in good faith the search procedures prescribed by the Rajender consent decree.

3. The basis for authority and jurisdiction of the Special Master rests with the Rajender consent decree and Title VII of the Civil Rights Act of 1964, as amended.

4. When the Department hired Peter Canning for the second junior position, it did not violate the affirmative

provisions of the Rajender consent decree or Title VII of the Civil rights Act of 1964, as amended.

5. When the Department hired Peter Canning for the second junior position, it did not discriminate against claimant Nancy Kobrin on the basis of her gender and in violation of the Rajender consent decree or Title VII of the Civil Rights Act of 1964, as amended.

6. Dr. Kobrin was not advanced from a semi-finalist to a finalist in the search process. The question of whether or not Kobrin was approximately as equally well-qualified as Canning for the position of assistant professor in the Comparative Literature Department was not at issue in Defendant's selection of Canning.

7. The issue before the Special Master is whether Dr. Kobrin was not selected for the position of assistant professor for an unlawful reason -- because she was a woman. Plaintiff has not sustained the burden of proving by preponderance of the evidence that an unlawful, discriminatory motive was the basis for her non-selection as assistant professor in the search process.

8. Based on the testimony of female faculty members from the Department of Comparative Literature and there being no credible evidence of a discriminatory work environment, the Special Master concludes that the environment for women in the Department is not hostile but rather is supportive.

9. The Special Master has considered each of plaintiff's claims and concludes that they do not evidence gender bias in any decision making with respect to her employment by the University of Minnesota.

10. Plaintiff has failed to prove that the University's articulated reasons for its employment decisions are merely a pretext for gender discrimination.

11. Plaintiff has failed to establish by a fair preponderance of the evidence that defendant intentionally discriminated against her.

12. Defendants are entitled to judgment.

RECOMMENDED ORDER FOR JUDGMENT

1. Let judgment be entered for Defendants.

/S/
Leonard E. Lindquist
Special Master

Dated: February 28, 1996.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Shyamala Rajender, on behalf of herself and a class of academic non-student employees and applicants at the University of Minnesota,	)	
Plaintiff,	)	Civil No. 4-73-435
and	)	
Phyllis Kahn, Florence K. Gleason, Silvia Azar, Bertila Herrera and Carol Gold,	)	CONSENT DECREE
Plaintiff-Intervenors,	)	
-vs-	)	
The University of Minnesota, and the Regents of the University of Minnesota,	)	
Defendants.	)	

Paul C. Sprenger, Eric L. Olson, and Robert L. Shutes; Sprenger, Olson & Shutes, P.A., 540 Midland, National Bank Building, Minneapolis, Minnesota 55401, attorneys for Plaintiffs and the class;* and Charles A. Mays and Stephen J. Davidson; Leonard, Street and Deinard, 1200 National City Bank Building, 510 Marquette Avenue, Minneapolis, Minnesota 55402, attorneys for Defendants (hereinafter "the University").

Miles W. Lord, J.

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* Terry M. Cosgrove; Johnson, Sands, Lizee, Fricker & McCloskey, Professional Association, 700 First National Bank Building, Minneapolis, Minnesota 55402, were granted leave by Order of the Court to withdraw as co-counsel for the class. Said counsel continue as co-counsel of record for one of the six named plaintiffs.

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INTRODUCTION

Plaintiff filed her Complaint on September 5, 1973, and her Second Amended Complaint on September 26, 1975,* alleging that the Defendants were engaged in employment discrimination based upon sex, national origin, and color in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended, and 42 U.S.C. §§ 1981 and 1983. The Defendants have denied the allegations. This Court has jurisdiction of the parties and of the subject matter in this action.

On February 13, 1978, the Court established a class consisting of all female academic non-student employees at the University of Minnesota, with provisions for applicants. On April 24, 1978, the Court commenced a pilot trial of the Rajender claims and the sex-based claims of a subclass consisting of that portion of the class in the University's Chemistry Department on the Twin Cities campus.

This Decree, being issued with the consent of the parties following eleven weeks of trial, shall not constitute an adjudication or finding on the merits of the case, and shall in no manner be construed as an admission by the Defendants or a finding by the Court of any violation of Title VII or of any Civil Rights Laws or of any other wrongful conduct or practices on the part of Defendants or either of them. Rather, it is the intention of the University, in light of its stated policy of promoting equal opportunity in employment, to implement this policy in the most effective and just manner possible and to divert the resources which would otherwise be spent in further contested litigation to this end. It is the intent of the

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* On May 16, 1975, Plaintiff's present counsel entered their appearance, and thereafter Plaintiff initially asserted class action allegations in her Second Amended Complaint.

parties to resolve by this Decree all issues raised by the Second Amended Complaint, to correct previous inequities, if any, and to achieve on behalf of women full representation with respect to faculty employment at the University of Minnesota.

This Decree shall be binding upon the parties, their agents, servants, employees, and all persons in active concert or participation with them who receive actual or constructive notice of this Decree, and

IT IS HEREBY ORDERED AND DECREED:

I. GENERAL PROSPECTIVE RELIEF:

A. The University is permanently enjoined from discriminating against women on the basis of sex with respect to the terms and conditions of employment, including, without limitation, recruitment, hiring promotion, salary, the renewal of regular appointments, and the granting of tenure, for all academic non-student employees.

B. The University shall establish, by modifying and supplementing existing procedures where necessary, a program of affirmative action for female academic non-student employees and applicants for such positions. "Affirmative action," for the purposes of this Decree, means: (1) procedures designed to advise women of available positions in the University; (2) good faith efforts to employ qualified women at least to the point where the proportion in each academic unit approximates the proportion of women obtaining the requisite advanced degree (and/or meeting the other relevant criteria) in the relevant discipline(s) within the five (5) years prior to the year in which such position is to be filled (for non-tenured positions), and within the ten (10) year period ending five (5) years prior to the year in which such

position is to be filled (for tenured positions); and (3) the establishment, to the extent not already existing, of written sex-neutral criteria for evaluating the qualifications of non-student academic employees as required by Part VI of this Decree.

Responsibility for the implementation of University affirmative action policies and procedures rests upon all officers of the University authorized to make decisions and/or recommendations in personnel matters, including, but not limited to, vice presidents, deans, directors, department heads, chairs and equal employment opportunity officers at the central, collegiate, and departmental levels, and upon all members of search committees. Ultimate responsibility for such policies and procedures rests with the Board of Regents of the University.

Affirmative action does not require the University to employ or retain a woman if another person is better qualified than she, provided, however, that where two or more candidates are approximately equally well qualified for a position and the hiring unit employs a percentage of women less than the proportion of women obtaining the requisite advanced degree (and/or meeting other relevant criteria) within the five (5) years prior to the year in which such position is to be filled (for non-tenured positions), or within the ten (10) year period ending five (5) years prior to the year such position is to be filled (for tenured positions), affirmative action requires that preference be given to an approximately equally well qualified female candidate over another candidate who is not also a member of a protected class as defined in this Decree.

Nothing in this Decree shall be construed to prevent the University from voluntarily adopting an affirmative action program for protected classes other than women to the same or similar effect as the one provided in this Decree for women.

C. The University's affirmative action program for women shall be consistent with the provisions of applicable federal statutes and regulations as the same may be modified from time to time and shall take into full consideration the University's obligations to all protected classes.

D. The University will establish a University Committee on Equal Employment Opportunity for Women (hereinafter referred to as "the Committee"), which shall report to the Faculty Senate and the University Senate through the Senate Committee on Faculty Affairs. The Committee shall consist of seven (7) members of the faculty of the University, as voting members, and a representative of the Office of the Vice President for Academic Affairs and a representative of the Equal Opportunity/Affirmative Action Office as ex officio, non-voting members. The Committee shall be selected to reflect the general interest of the University in the pursuit of excellence in teaching and research as well as the special interests of women. For the duration of this Decree, five (5) members shall be appointed in the manner prescribed for the selection of University Senate Committees. In addition, the plaintiff class shall elect (pursuant to a procedure and for a term to be established by the Special Master) two (2) full-time University faculty members, at least one (1) of whom shall be a member of the regular faculty. The Committee shall have the following charge:

> The Committee shall recommend policies which would guarantee equal employment opportunity for women in the faculty of the University. It shall review the University's progress in implementing the terms of the decree in Rajender v. University of Minnesota and shall consult with the University Equal Opportunity Officer and the President concerning any problem areas in this regard. It shall propose approaches for assuring that the University

has an active affirmative action program for women in all of its academic units. It may examine policies of the University to determine whether they would have a disparate impact on women, and may make recommendations to the University administration or to the University Senate, if they do. The Committee shall advise the University administration, but does not itself have administrative authority. The Committee shall report to the Senate through the Senate Committee on Faculty Affairs.

The Committee shall have the powers common to University Senate Committees. It shall be constituted initially as soon as practicable after this Decree becomes final judgment, but in no event later than the end of the first full academic quarter thereafter.

Service on the Committee shall be treated as a positive contribution to the University and to the academic unit in which the Committee member is employed. In connection with any decision involving the terms and conditions of employment where contributions to the University or the academic unit are relevant, the University will give the same weight to service on the Committee as it does to service on any other University Senate Committee.

E. 1. The University shall cause each academic unit (normally the department) in which initial hiring decisions are made to set goals and timetables for the hiring of female faculty, periodically, but not less frequently than every two (2) years, in a manner consistent with the then applicable federal regulations. Each such academic unit shall attach to its statement of goals and timetables a copy of the most recent goals and timetables previously set by the academic unit. If those goals and timetables have not been met for women, such academic unit shall also attach a written explanation stating why such goals and timetables have not been met. A copy of

any statement of goals and timetables which has such a written explanation attached shall be forwarded by the University Equal Opportunity Officer to the Committee established pursuant to Paragraph I.D of this Decree.

2. The University shall also cause each collegiate unit to aggregate the goals of its constituent academic units set pursuant to Paragraph I.E.1, but this aggregated calculation is for information only and creates no additional goals. The head of each academic unit and collegiate unit shall maintain a copy of the goals and timetables for that unit, and the University Equal Opportunity Officer shall maintain a complete set for all units, and shall make it available for inspection to the Committee or to any member of the class.

3. The University shall also cause each academic unit in which initial hiring decisions are made to identify availability pool data sources pursuant to the procedures outlined in Exhibit A hereto and to follow the Search Procedures outlined in Exhibit B hereto. Such data will be used to determine when an approximately equally well qualified female candidate must be given preference over another candidate who is not also a member of a protected class, pursuant to Paragraph I.B of this Decree, and are not intended to assign a fixed number of places to women.

4. The University shall provide to each academic unit in which initial hiring decisions are made, annually in advance of the commencement of any search procedures by that unit, the following summaries of availability pool data and applicant flow and hiring data:

a. A summary of the statistical availability of women (stated separately for tenured and non-tenured positions) possessing the requisite degree(s) in the discipline(s) identified by the academic unit pursuant to Paragraph 2 of Exhibit A to this Decree. This summary shall be calculated in the manner set forth in Paragraph 2.b of Exhibit B to this Decree.

b. A cumulative summary for the five (5) most recent academic years (stated separately for tenured, tenure-track, and non-regular faculty positions and excluding those positions where no search is required by Paragraph 7 of Exhibit B to this Decree) of (1) the total applications for regular faculty positions received by the academic unit, (2) the total number of such applications received from women, and (3) the percentage of the total applications received from women. This summary shall be calculated from official University documents, which may include Forms 16 and 17 as they may be from time to time modified.

c. A cumulative summary for the five (5) most recent academic years (stated separately for tenured, tenure-track, and non-regular faculty positions and excluding those positions where no search is required by Paragraph 7 of Exhibit B to this Decree) of (1) the total applicants for faculty positions who were "seriously considered," (2) the total number of "seriously considered" applicants who were women, and (3) the percentage of the total applicants "seriously considered" that the women "seriously considered" constituted. This summary shall be calculated from official University documents, which may include Forms 16 and 17 as they may be from time to time modified.

d. A cumulative summary for the five (5) most recent academic years (stated separately for tenured, tenure-track and non-regular faculty positions and excluding those positions where no search is required by Paragraph 7 of Exhibit B to this Decree) of (1) the total number of persons hired, (2) the total number of women hired, and (3) the percentage of total persons hired that were women.

The University will exercise its best efforts to have such summaries and the data upon which they are based in

computer readable form within twelve (12) months from the date of entry of this Decree and shall, on the anniversary date of this Decree, report to the Special Master and the Committee what progress has been made in this regard. In the event the Special Master determines that reasonable progress has not been made or that the University has not exercised its best efforts, (s)he shall order the University to take such action deemed necessary to have such summaries and data upon which they are based in computer readable form as promptly as possible. A hard copy of the summaries of such data prepared annually for each academic unit in which initial hiring decisions are made shall be maintained in the office of the University Equal Opportunity Officer for a period of three (3) years and the summaries for a given collegiate unit shall be available for inspection during regular office hours by any applicant for a faculty position in any of its constituent academic units. In addition, all such summaries shall be available for inspection by any member of the Committee.

5. The University shall, in all solicitations, notices and advertisements for vacancies in academic non-student positions, include the following language: "The University of Minnesota specifically invites and encourages applications from women and minorities."

II. RESOLUTION OF PAST AND FUTURE INDIVIDUAL CLAIMS:

A. Any member of the class who has reason to believe that she has been injured by unlawful sex discrimination in the University's employment practices, policies or procedures as the result of any act or decision which occurred at any time after March 24, 1972, may file a claim with the Special Master as hereinafter provided. The Special Master shall defer action on such claim for up to one hundred eighty (180) days, exclusive of the period of June 16 to September 15. The

Special Master shall forward a copy of each such claim to the University.

B. All such claims shall be in the form attached to the Class Notice or in a facsimile thereof. The claim shall: (1) describe the act, decision, employment policy, practice or procedure complained of, (2) state the facts known to the claimant upon which the claim is based, (3) contain such supporting documentation as is then available to her, (4) include a specific allegation of sex discrimination, and (5) state the relief which is requested. Two or more claimants who assert that they have been injured by the same act, decision, policy, practice or procedure may elect to file a single claim.

C. All such claims relating to acts occurring before the effective date of this Decree must be postmarked no later than sixty (60) days from the date of last publication of the Notice required to be published pursuant to this Decree. All such claims relating to acts occurring on or after the effective date of this Decree shall be postmarked no later than sixty (60) days after notice of the action complained of.

D. 1. The Special Master shall defer action on any claim which has not been previously heard and determined by an appropriate University tribunal and shall refer such claim to the University, which may refer the matter to an appropriate internal academic tribunal. This deferral of action by the Special Master shall be for the sole purpose of permitting a final fully informed, internal judgment by the University on the claim. The report of the internal tribunal, its conclusions, recommendations or any part thereof shall not be admissible in evidence in any subsequent proceeding. This internal proceeding shall not in any way prejudice the Claimant by limiting evidence in further proceedings. However, statements made and evidence submitted in the internal proceeding may be used in any subsequent proceeding to the extent permitted by the Federal Rules of Evidence. The Claimant shall appear as a witness, subject to cross-examination, and shall produce

documents and other evidence in her possession or control relevant to her claim and shall present her claim in accordance with the procedural rules of the tribunal. If she fails to assist an appropriate internal tribunal in good faith sanctions may be imposed as provided in Paragraph II.D.5. The University shall have the obligation to produce witnesses, subject to cross-examination, shall produce documents and other evidence in its possession or control relevant to the claim, and shall proceed in accordance with the procedural rules of the tribunal. If it fails to do so, sanctions may be imposed as provided in Paragraph II.D.5.

If the Claimant is entitled to a hearing before a University internal tribunal on any other claim(s) relating to the same subject-matter, she shall have the right to submit such other claim(s) to the same internal tribunal for concurrent consideration by so specifying in writing. If she fails to do so, she will be deemed to have refused to submit such other related claim(s) in a timely way, to have waived the right to an internal hearing on any such claim(s) and to have waived any substantive claim(s) based on the University's failure to offer an opportunity for such a hearing.

The internal tribunal shall forward its report and recommendations to the Claimant and to the President of the University. The President shall make the University's final internal decision on the matter, shall send a copy of that decision to the Claimant, and shall notify the Special Master that (s)he has done so, in the form prescribed in Exhibit C.

The University shall complete any internal review of the matter and the President shall make the final internal decision within:

a. one hundred twenty (120) days, in the case of claims brought by unsuccessful applicants for positions, alleging only sex discrimination, in which the Claimant was not an employee of the University at the time of the act or decision complained of, or

b. one hundred eighty (180) days, in all other cases. The applicable period shall run from the date the Special Master sends the Claim to the University. The period from June 16 to September 15 shall not be included in computing the period. If the University has not completed its internal consideration of the matter within the prescribed period, it shall be deemed to have waived further internal consideration of such claim.

2. With respect to any such claim which has been fully heard and determined by an appropriate University tribunal prior to the effective date of this Decree, the President shall, within sixty (60) days of the date the Special Master sends the Claim to the University, either confirm or modify the University's previous decision, shall send a copy of this final decision to the Claimant, and shall notify the Special Master that (s)he has done so, in the form prescribed in Exhibit C.

3. Within sixty (60) days after the date the President sends the University's final internal decision to the Claimant, or the due date thereof, whichever is earlier, the Claimant shall either make a written Request to Proceed or withdraw the claim. If the Claimant has neither filed a Request to Proceed nor withdrawn the claim within sixty (60) days of the date the President sends the Special Master the notice specified in Exhibit C, the Special Master shall notify the Claimant in writing that, unless her Request to Proceed is submitted and postmarked within an additional twenty-one (21) days, her claim will be dismissed.

4. During the period between the filing of the claim and the due date for the Request to Proceed, the Claimant and the University shall be accorded any discovery permitted by the Federal Rules of Civil Procedure and may request assistance of the Special Master in obtaining it. If a Claimant wishes to inspect anything other than summary of statistical data regarding the act or decision which is the subject of her claim, she shall apply to the Special Master (in such form and

manner as the Special Master may require) for leave to inspect such other documents or things, and the Special Master shall grant such leave only if (s)he concludes that the documents sought are relevant to the claim being asserted by the Claimant. In determining relevancy, the Special Master shall apply the law relating to discovery in Title VII cases. In the event that the University wishes to inspect any documents or things in the possession or control of the Claimant, the University shall address such a request to the Special Master, who shall apply the same standard of relevance outlined above. The parties shall abide by the discovery decisions of the Special Master and shall be subject to the sanctions provided in the Federal Rules of Civil Procedure for failure to comply with the discovery orders. In the event the Special Master grants discovery to either party beyond inspection of summary or statistical data, the party seeking such discovery shall execute a confidentiality agreement in a form prescribed by the Special Master, which shall be substantially similar to that attached hereto as Exhibit D.

5. Upon receiving a written Request to Proceed, the Special Master shall allow a further reasonable period of at least ninety (90) days from the date of the postmark on the Request to Proceed for additional discovery. During this ninety-day period, the Special Master shall direct the claimant and the academic unit involved each to designate one person to sit as a member of the panel to hear the claim. These two persons and the Special Master shall constitute the "Hearing Panel." The Hearing Panel shall promptly hear and determine the claim at the conclusion of the ninety-day discovery period. Claims relating to the same subject matter which have been submitted for concurrent consideration by the University tribunal but which are not based on sex discrimination shall not be heard by the Hearing Panel.

If, on notice and motion, the Special Master determines that the Claimant did not make a good faith effort

to comply with the requirements of Paragraph II.D.1, the Special Master may continue to defer the proceedings until she has done so. If, on notice and motion made at any time during the deferral period, the Special Master determines that the University is not making a good faith effort to refer the matter to an appropriate internal tribunal or has not otherwise complied with Paragraph II.D.1, the Special Master may shorten the deferral period.

Service on a Hearing Panel shall be treated as a positive contribution to the University and to the academic unit in which the Hearing Panel member is employed. In connection with any decision involving the terms and conditions of employment where contributions to the University or the academic unit are relevant, the University will give the same weight to service on a Hearing Panel as it does to service on a University Senate Committee. All reasonable out-of-pocket expenses made necessary by a panel member's service on a Hearing Panel shall be paid by the University.

6. If the Special Master finds that more than one (1) claim is made involving appointment or promotion to the same position in the same academic unit, all such claims of sex discrimination shall be consolidated for hearing before a single Hearing Panel and, if the Hearing Panel makes a determination adverse to the academic unit, they shall also determine which of the Claimants, if any, was more qualified for the position than the person hired. In the event that the Hearing Panel finds that more than one of the Claimants was more qualified than the person hired, they shall also determine which of said Claimants was most qualified for the position. The relief provided in Paragraph II.D.9 shall be granted only to one Claimant in the instance of any one position. If the Claimants participating in such a consolidated hearing cannot agree on a single person to designate as their representative on the

Hearing Panel, the Special Master shall designate the Claimants' representative.

7. The Special Master shall preside at all non-internal hearings held pursuant to Paragraphs II.D.5 and II.D.6 of this Decree and regulate their course. The parties shall be afforded reasonable opportunity to present their cases to the Hearing Panel by oral testimony and other evidence, to confront and cross-examine witnesses and otherwise to rebut the evidence of the other party. The proceedings before the Hearing Panel shall be governed by the Federal Rules of Evidence and the Federal Rules of Civil Procedure. All evidentiary rulings shall be made by the Special Master. All decisions of the Hearing Panel on the merits of a Claim and on other issues shall be made by majority vote of the Panel. The deliberations of the Hearing Panel preceding all such decisions shall be conducted in private.

The Special Master shall have the power to subpoena persons, documents, and things and to administer oaths in connection with proceedings before the Hearing Panel.

The hearing before the Hearing Panel shall be public and shall be reported by stenotype, or recorded on tape, verbatim. This report or recording shall be kept by the Special Master as part of the record in the case. On request of the Claimant or the University, the Special Master shall make a transcript or a copy of the recording available to the requesting party for copying.

8. In all matters heard by a Hearing Panel pursuant to Part II of this Decree, the respective burdens of proof shall be those placed on litigants in civil actions under Title VII. Evidence of statistical disparity or the lack thereof may be introduced in any such hearing and shall be given the weight accorded thereto by statute or judicial decision in employment discrimination cases under Title VII. If the burden of going forward shifts to the University, the University shall have, in

addition to the burdens otherwise provided by law, the burden of proving, by the preponderance of the evidence, that the search procedures prescribed by Exhibit B (for hiring decisions or decisions not to fill a faculty position) or the evaluation procedures required by Part VI of this Decree (for tenure and promotion decisions), as appropriate, were followed in good faith.

As to matters heard by the Panel with respect to the Chemistry Department, a Claimant will be deemed to have established a prima facie case upon a showing that she unsuccessfully applied for a position in that department or was deterred from applying for such a position by the University's discriminatory practices. The burden shall then be on the University to demonstrate that the Claimant was denied employment opportunity for lawful reasons.

9. In the event a Hearing Panel determines, pursuant to the procedures required in this Decree, that discrimination has occurred, that a particular Claimant should have been hired, granted tenure, contract renewal or promotion, received greater compensation, or that other action should have been taken by the academic unit, and that the Claimant suffered injury as a result thereof, the Hearing Panel shall, consistent with the methods for awarding restitution in Title VII claims, determine the amount of backpay due the Claimant. In determining backpay, the Hearing Panel shall reduce the Claimant's interim earnings by her expenses incurred as a result of the discriminatory action taken by the academic unit, including without limitation, moving expenses and costs incurred in seeking employment. The burden will be upon the Claimant to establish the amount of any claim for backpay, and that she has fully performed any duty she may have under Title VII to mitigate her damages.

In any Claim Proceeding hereunder before a Hearing Panel in which a Claimant finally prevails, she shall receive, in addition to any backpay or other relief to which she

may be entitled, her reasonable costs and disbursements which would be recoverable in a Title VII action and a reasonable sum, not exceeding Six Thousand Dollars ($6,000), for partial attorneys' fees which she incurred because of the proceeding. If University regulations governing internal grievance proceedings are ever amended to provide for an award of attorneys' fees, then any sums received in reimbursement of expenses and as attorneys' fees in any Claim Proceeding shall be in addition to any amount awarded to the Claimant by the University pursuant to such regulations; provided, however, that, in determining the amount of reasonable attorneys' fees in Claim Proceedings, the Special Master shall take into consideration whether the Claimant or her counsel has already been compensated for the same work by the University in connection with the internal grievance proceeding. Any application for reimbursement of expenses and attorneys' fees shall be submitted to the Special Master within twenty-one (21) days after the Claim has been decided and all appeals are exhausted or the time for appeal has expired.

No form of monetary relief other than backpay, reimbursement of expenses, and reasonable attorneys' fees will be granted. The University shall pay each monetary award in full no later than one hundred twenty (120) days after the close of the fiscal year in which the award becomes final. An award of monetary relief will carry interest at the rate of eight percent (8%) from the date of the award.

In addition to any monetary relief, as prescribed above, awarded as a remedy herein, any Claimant who, but for sex discrimination, would have been renewed or hired to fill a vacancy which was filled by a person not a member of a protected class after March 24, 1972, shall be offered the next available position of a substantially equivalent rank for which the Claimant applies in the academic unit involved, in preference to any other person. The academic unit shall notify such Claimant of each faculty position vacancy in that unit

occurring over the four (4) years following the Hearing Panel's determination and shall allow the Claimant a reasonable time in which to submit her application for such position. The requirements of this paragraph shall remain in effect for four (4) years. In making an award of an offer of employment, the Court shall retain jurisdiction over the matter if the employment is in the tenure-track or in a nonregular position for a period of three (3) years after termination of employment in the particular academic unit involved or until the Claimant is granted tenure, whichever first occurs.

10. The Special Master shall formulate in writing findings of fact, conclusions of law, and recommendations based solely on the evidence in the record which support the Hearing Panel's determination. The District Court's review of the findings and conclusions of the Special Master shall be governed by Rule 53(e)(2), Federal Rules of Civil Procedure. Upon review of the report of the Special Master on each such claim, the District Court shall enter an appropriate order and make an express determination pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason to delay the entry of final judgment on such claim and shall forthwith cause judgment to be entered thereupon and shall notify the parties to the claim that judgment has been entered. The parties to the claim fully reserve the right to appeal to the Court of Appeals for the Eighth Circuit from any judgment entered by the District Court pursuant to the findings, conclusions, and recommendations of the Special Master.

11. Except as provided in Part III of this Decree, any person who files a Request to Proceed with the Special Master for resolution of her individual claims pursuant to Part II of this Decree will have thereby waived the right to pursue any and all other avenues of relief with respect to those claims, including without limitation those afforded under Federal or State law. Any person who elects not to file such a Request to Proceed with the Special Master may pursue any other avenue

of relief existing under Part III of this Decree or under Federal or State law, but will have thereby waived and relinquished the right to pursue any other avenue of relief afforded by the terms of this Decree.

III. RESOLUTION OF PETITIONS FOR DECLARATORY RELIEF

A. Any fulltime female, non-student academic employee of the University who would have standing to bring an action for a declaratory judgment under 28 U.S.C. § 2201 and who has reason to believe that an employment practice, policy or procedure of the University or any of its constituent units violates the provisions of Title VII or of this Decree, may file a Petition with the Special Master as hereinafter provided. The Special Master shall defer action on such Petition for up to one hundred eighty (180) days, exclusive of the period of June 16 to September 15, as provided herein. The Special Master shall forward a copy of each such Petition to the University.

B. All such petitions shall be in a form attached to the Class Notice or in a facsimile thereof. The Petition shall: (1) describe the employment policy, practice or procedure, claimed to be unlawful, (2) identify the persons affected by such policy, practice or procedure, (3) state the facts known to the Petitioner upon which the Petition is based, (4) contain such supporting documentation as is then available to her, and (5) include a specific allegation of sex discrimination.

C. 1. Within thirty (30) days of the date on which the Special Master sends the copy of the Petition to the University, the President may refer the policies, practices or procedures challenged therein to appropriate University committee(s), administrator(s) or other body(ies) for review. The President shall notify the Petitioner of the reviewing group(s). The reviewing committee(s), administrator(s) or

body(ies) shall give the Petitioner an opportunity to present her views and shall notify her of public meeting(s) at which the matter will be considered. The purpose of this review is to give the University an opportunity to review the policies generally before the narrower question of their legality is tried pursuant to the provisions of this Decree. If the President fails to notify the Petitioner within the thirty (30) day period of referral to a reviewing body, the period of deferral shall end.

2. If the President determines not to submit the questions raised in the Petition for internal review, (s)he shall notify the Petitioner and the Special Master within thirty (30) days of the date the Special Master sends the Petition to the University. This will end the period of deferral.

3. If the University completes the internal review before the expiration of the one hundred eighty (180) day period, the President shall notify the Petitioner of the nature of the University's resolution of the matter and shall notify the Special Master that the internal review is concluded. This will end the period of deferral.

D. The period of deferral for University consideration expires on the earliest of:

1. One hundred eighty (180) days after the Special Master sends the Petition to the University, or

2. Thirty (30) days after the Special Master sends the Petition to the University, if the President fails to make a reference as provided in Paragraph III.C.1., or

3. Upon the President's sending notice to the Petitioner and Special Master as provided in Paragraph III.C.2, or III.C.3.

E. No later than sixty (60) days after the expiration of the deferral period, the Petitioner shall either make a written Request to Proceed, or withdraw the Petition. If the Petitioner has not filed a Request to Proceed within the sixty (60) day period, the Special Master shall notify the Petitioner in writing that, unless her Request to Proceed is filed and

postmarked within an additional twenty-one (21) days, her Petition will be dismissed.

F. Upon receiving a written Request to Proceed, the Special Master shall allow a reasonable period of at least ninety (90) days from the date of the postmark on the Request to Proceed for discovery. During this period, the Petitioner and the University shall be accorded any discovery permitted by the Federal Rules of Civil Procedure and may request the assistance of the Special Master in obtaining it. If a Petitioner wishes to inspect anything other than summary or statistical data regarding the employment policy, practice or procedure which is the subject of her Petition, she shall apply to the Special Master (in such form and manner as the Special Master may require) for leave to inspect such other documents, and the Special Master shall grant such leave only if (s)he concludes that the documents sought are relevant to the claim being asserted in the Petition. In determining relevancy, the Special Master shall apply the law relating to discovery in Title VII cases. In the event that the University wishes to inspect any documentation in the possession or control of the Petitioner, the University shall address such a request to the Special Master, who shall apply the same standard of relevance outlined above. The parties shall abide by the discovery decisions of the Special Master and shall be subject to the sanctions provided in the Federal Rules of Civil Procedure for failure to comply with discovery orders. In the event the Special Master grants discovery to either party beyond inspection of summary or statistical data, the party seeking such discovery shall execute a confidentiality agreement in a form prescribed by the Special Master, which shall be substantially similar to that attached hereto as Exhibit D.

G. During the ninety (90) day discovery period, the Special Master shall direct the Petitioner and the academic unit involved each to designate one person to sit as a member of

the panel to hear the Petition. These two persons and the Special Master shall constitute the "Hearing Panel." If more than one person has joined in the Petition and Petitioners cannot agree on a single person to designate as their representative on the Hearing Panel, the Special Master shall designate the Petitioners' representative.

Service on a Hearing Panel shall be treated as a positive contribution to the University and to the academic unit in which the Hearing Panel member is employed. In connection with any decision involving the terms and conditions of employment where contributions to the University or the academic unit are relevant, the University will give the same weight to service on a Hearing Panel as it does to service on a University Senate Committee. All reasonable out-of-pocket expenses made necessary by a panel member's service on a Hearing Panel shall be paid by the University.

The Hearing Panel shall promptly hear and determine the Petition at the conclusion of the ninety (90) day discovery period. The Special Master shall preside at all non-internal hearings held pursuant to Part III of this Decree and regulate their course. The parties shall be afforded reasonable opportunity to present their cases to the Hearing Panel by oral testimony and other evidence, to confront and cross-examine witnesses, and otherwise to rebut the evidence of the other party. The proceedings before the Hearing Panel shall be governed by the Federal Rules of Evidence and the Federal Rules of Civil Procedure. All evidentiary rulings shall be made by the Special Master. All decisions of the Hearing Panel on the merits of a Petition and on other issues shall be made by majority vote of the Panel. The deliberations of the Hearing Panel preceding all such decisions shall be conducted in private.

The Special Master shall have the power to subpoena persons, documents, and things and to administer oaths in connection with proceedings before the Hearing Panel.

The hearing before the Hearing Panel shall be public and shall be reported by stenotype, or recorded on tape, verbatim. This report or recording shall be kept by the Special Master as part of the record in the case. On request of the Petitioner or the University, the Special Master shall make a transcript or a copy of the recording available to the requesting party for copying.

In any Petition Proceeding hereunder before a Hearing Panel in which a Petitioner finally prevails, she shall receive her reasonable costs and disbursements which would be recoverable in a Title VII action, and a reasonable sum, not exceeding Six Thousand Dollars ($6,000), for partial attorneys' fees which she incurred because of the proceeding. If University regulations governing internal grievance proceedings are ever amended to provide for an award of attorneys' fees, then any sums received in reimbursement of expenses and as attorneys' fees in any Petition Proceeding shall be in addition to any amount awarded to the Petitioner by the University pursuant to such regulations; provided, however, that, in determining the amount of reasonable attorneys' fees in Petition Proceedings, the Special Master shall take into consideration whether the Petitioner or her counsel has already been compensated for the same work by the University in connection with the internal grievance proceeding. Any application for reimbursement of expenses and attorneys' fees shall be submitted to the Special Master within twenty-one (21) days after the Petition has been decided and all appeals are exhausted or the time for appeal has expired.

H. 1. If the Petition alleges violation of the provisions of Title VII, the respective burdens of proof for the parties in the proceeding shall be the same as those placed upon litigants in civil actions under Title VII. In the event a Hearing Panel

determines, pursuant to the procedures required in this Decree, that an employment practice, policy or procedure violates Title VII, they shall declare that such practice, policy or procedure is unlawful as to the persons identified in the Petition or any subgroup thereof. In the event that the Hearing Panel determines, pursuant to the procedures required in this Decree, that an employment practice, policy or procedure does not violate Title VII, they shall declare that such policy, practice or procedure is lawful as to the persons identified in the Petition or any subgroup thereof.

2. If the Petition alleges violation of the terms of this Decree, which is not also a violation of Title VII, the burden of proof shall be on the Petitioner to establish such violation. In the event a Hearing Panel determines, pursuant to the procedures required in this Decree, that an employment practice, policy of procedure violates the terms of this Decree, they shall so declare. In the event that the Hearing Panel determines, pursuant to the procedures required in this Decree, that an employment practice, policy or procedure does not violate the terms of the Decree, they shall so declare.

3. No question other than the alleged violation of Title VII or the alleged violation of this Decree specified in the Petition shall be within the jurisdiction of the Hearing Panel.

4. No form of relief other than the declarations provided in Paragraphs III.H.1 and III.H.2 shall be granted on any Petition under this Part, provided, however, that nothing in Part III of this Decree shall bar a person from receiving relief provided for in Part II of this Decree if the person complies with the requirements of Part II and is found to be entitled to relief in a proceeding held pursuant to Part II.

I. The Special Master shall formulate in writing findings of fact, conclusions of law, and recommendations based solely on the evidence in the record which support the Hearing Panel's determination. The District Court's review of the findings and conclusions of the Special Master shall be

governed by Rule 53(e)(2), Federal Rules of Civil Procedure. Upon review of the report of the Special Master on each such petition, the District Court shall enter an appropriate order and make an express determination pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason to delay the entry of final judgment on such petition and shall forthwith cause judgment to be entered thereon and shall notify the parties that judgment has been entered. The parties to the Petition fully reserve the right to appeal to the Court of Appeals for the Eighth Circuit from any judgment of the District Court entered pursuant to the findings, conclusions, and recommendations of the Special Master.

J. Any Petitioner who files a Request to Proceed with the Special Master pursuant to Part III of this Decree will have thereby waived the right to pursue any and all other avenues of relief relating to the subject-matter of the Petition, including without limitation, those afforded under Federal or State law. A person may, however, file both a Claim under Part II and a Petition under Part III of this Decree. Any Petitioner who elects not to file a Request to Proceed on the Petition with the Special Master may pursue any other avenue of relief existing under Federal or State law or under Part II of this Decree, but will have thereby waived and relinquished the right to pursue any avenue of relief afforded by the terms of Part III of this Decree.

IV. SPECIAL MASTER:

A. Pursuant to the terms of this Decree, the Court shall appoint an attorney who has been agreed upon by both parties and the Court as a Special Master. If the office of Special Master becomes vacant, the Court shall appoint an attorney who has been agreed upon by both parties and the Court as successor Special Master. If the Special Master determines that (s)he needs assistance in performing his/her duties, (s)he

may apply to the Court for the appointment of Assistant Special Masters. If the Court determines that one or more such Assistant Special Masters are needed, (s)he shall be appointed upon agreement of the parties and the Court as to the person(s) to serve in that capacity.

B. The Special Master shall periodically submit to the Court accounts of his/her expenses, including a reasonable fee for the services of the Special Master and any Assistants. On order of the Court, made after notice to the University and an opportunity to be heard, such accounts of expenses and reasonable fees as are approved by the Court shall be paid by draft from the Clerk of Court. The University shall maintain an account with the Clerk of Court sufficient to pay such expenses and fees. The expenses properly reimbursable to the Special Master may include the expense of any and all notices to the class required to be given pursuant to this Decree.

V. DEFINITIONS:

A. For purposes of this Decree:

1. An "academic employee" of the University is one in an academic classification. Academic employees are divided into two categories, faculty members and non-faculty academic employees.

2. A "faculty member" is an academic employee who holds the rank of professor (including Regents professor), associate professor, assistant professor, instructor, research associate, research fellow or lecturer. A "non-faculty academic employee" is any other academic employee. Faculty members are divided into two categories, regular faculty members and non-regular faculty members.

3. A "regular faculty member" is a faculty member who holds a position designated "regular" according to the University's Regulations Concerning Faculty Tenure.

A "non-regular faculty member" is a faculty member who holds a position designated "non-regular," according to those Regulations. Regular faculty members are divided into two categories, tenured and probationary.

4. A "tenured faculty member" is a regular faculty member who holds continuous tenure according to the Regulations Concerning Faculty Tenure. A "probationary faculty member" is a regular faculty member on probationary status according to those Regulations, or a person holding an analogous position under special contract. A "tenure track" position is synonymous with a "probationary faculty" position.

5. A "student employee" is an employee who is a student at the University of Minnesota other than an occasional or part-time student in extension or similar courses not leading to a degree. A "non-student employee" is an employee who is not a student employee.

6. A "full-time academic employee" is an employee who is employed at least two-thirds (2/3) time over the academic year as a whole, i.e., one hundred percent (100%) time for two (2) quarters or sixty-seven percent (67%) time for three (3) quarters or some equivalent combination. A "part-time" employee is an employee who is not a full-time employee.

7. For the purposes of determining availability pursuant to Paragraphs I.B and I.E, and Exhibits A and B only, "non-tenured" faculty members means non-regular faculty members and probationary faculty members. This special definition does not apply elsewhere and in particular does not apply to Part VI (Evaluation Procedures) or to those portions of Exhibit B (Search Procedures) where separate procedures are established for probationary and non-regular faculty.

B. For the purposes of this Decree:

1. An "academic unit" is an administrative subdivision of the University within which initial recommendations and decisions on hiring and tenure take place. It is normally a department, but in some circumstances may be a school, division, college, institute or other subdivision.

2. The "head" of an academic unit is the chief administrative officer of the unit. It is normally a head or chairperson, but in some circumstances may be a dean, director or other officer.

3. The "tenured faculty" of an academic unit consists of the tenured regular faculty members of that unit.

4. A "collegiate unit" is a school, college, institute, campus or similar administrative grouping of academic units, as determined by the University.

5. The "head" of a collegiate unit is the chief administrative officer of that unit. It is normally a dean, but in some circumstances may be a director, provost or other officer.

C. For the purposes of this Decree "protected class(es)" means any class of persons entitled to affirmative action pursuant to applicable law or regulation (including regulations governing contractors with the federal or state governments) other than any such class of persons which, at the time of a particular employment decision, is statistically either at parity or over-represented in the academic unit according to the calculations used to determine when an approximately equally well qualified female candidate is to be preferred over another candidate who is not a member of a protected class, as set out in Exhibit B to the Decree.

D. For the purposes of this Decree, "Title VII" means Title VII of the Civil Rights of 1964, as amended, 42 U.S.C. § 20003, et seq.

E. Persons appointed as county extension agents by joint action of the University and the county boards of the several counties pursuant to Minnesota Statues §§ 38.33 through 38.38 shall not be deemed to be "academic employees" of the University for the purposes of this Decree, even if they hold academic titles which might otherwise qualify them as such.

F. In the event of any ambiguity or conflict in the terms or provisions of this Decree, the Decree shall be construed in accord with Title VII.

G. Exhibits A, B, C and D are incorporated into and made part of this Decree.

VI. EVALUATION PROCEDURES:

A. For regular faculty positions, each academic unit shall have established, by January 1, 1981, and shall maintain written sex-neutral criteria and evaluation procedures for: (a) hiring; (b) salary review and adjustment; (c) contract renewal; and (d) granting of tenure and promotions. These criteria and evaluation procedures shall be stated and applied as objectively as possible and the academic unit shall also state in writing the proportionate weight or importance which it will attach to each criterion. The weight assigned to different criteria may differ for different positions within the academic unit. Without limitation and by way of example, hiring criteria which an academic unit may adopt could include: (a) effectiveness in teaching; (b) professional distinction in research and writing or artistic production; (c) the personnel needs, programs, policies, priorities, and options of the academic unit concerned and the necessary qualifications of applicants or other available individuals to satisfy them; and (d) contributions, other than teaching, research and writing, to the University, the community, the state, and the nation. Criteria (a) and (b) must be considered primary; satisfaction of

criteria (c) and (d) alone would not constitute adequate grounds for hiring in the absence of a satisfactory record with respect to criteria (a) and (b).

B. For regular probationary faculty positions, commencing no later than January 1, 1981:

1. Each academic unit shall maintain written procedures for annual reviews. The head of an academic unit will maintain a file on each such employee in his/her academic unit which will include copies of: (a) appointment and salary correspondence; (b) all previous annual reviews of the employee; (c) an annually revised curriculum vitae of the employee; (d) citations to or copies of his/her scholarly publications; and (e) materials on teaching performance (including University-approved student evaluations to the extent they exist).

2. The head of the relevant academic unit (or other designated faculty member) and each such employee will be responsible for submitting such information within their control, respectively, so that each such employee's file contains up-to-date information. If the information in such files appears incomplete or uninformative, the head of the relevant academic unit (or other designated faculty member) shall make a reasonable effort to obtain additional information from the employee; however, the responsibility for furnishing or withholding complete and accurate information that has been requested must rest upon the employee. The head of the academic unit shall inform the academic employees of the academic unit of their right under Minnesota law (Minnesota Laws, 1975, Chapter 401) to examine or obtain copies of filed data of which they are the subjects and to have the meaning of it explained to them. (S)he shall encourage each such employee to review periodically his/her personnel files and to add materials or observations the employer thinks are needed to complete or correct the file.

3. The annual review of each such employee will be conducted on a regular annual schedule at a duly called meeting of the tenured faculty for the relevant academic unit. The contents of the employee's file will be reviewed and his/her performance will be evaluated in accordance with the written sex-neutral criteria established by the academic unit pursuant to Paragraph A.

4. A written report containing the evaluation of each such employee will be made under the direction of the head of the academic unit. Upon completion of the report the head of the relevant academic unit (or other designated faculty member) shall arrange to meet with the employee and personally present to him/her the evaluation by the tenured faculty. The report shall then be filed in the employee's file. Within fifteen (15) days of this meeting, the employee may file a written comment in response to his/her evaluation report, and such comment shall be placed in his/her file. Lack of such comment shall not be construed as total agreement with the tenured faculty evaluation.

C. Non-regular faculty positions are for a fixed period of time and carry no promise of renewal or of special consideration for appointment to regular faculty positions and are not intended by the University to create any such expectation. However, each academic unit will give timely notice to all non-regular faculty employees in the unit of vacancies in that unit in the regular faculty and of available non-regular appointments in the unit in any given academic year, and shall give such non-regular faculty employees the opportunity to apply for such positions and to be considered for them on an equal footing with all other applicants. The University may limit the total length of time a person may serve in a non-regular position, provided such limitation is applied in a sex-neutral manner.

D. For non-regular, temporary or part-time faculty appointments, each academic unit shall have established by January 1, 1981, and shall maintain written sex-neutral criteria and evaluation procedures for hiring and salary determination. Such written criteria and evaluation procedures shall be stated and applied in the manner set forth in Paragraph A above, but they may be different from those used for regular faculty in the same unit.

E. By January 1, 1981, each academic unit employing non-faculty academic non-student employees shall develop and maintain written sex-neutral procedures and criteria for hiring, salary, and promotion decisions for such persons.

F. Through the appropriate vice president or provost, all collegiate units will be directed:

1. To develop, by September 1, 1980, specific written instructions for their departments concerning the implementation of the University's affirmative action policies and programs and to submit them to the Vice President for Academic Affairs and University Equal Opportunity Officer for review and approval; the instructions should address such questions as the composition of search committees, search committee procedures consistent with the terms of this Decree, and the advertising of open positions (including nonregular faculty positions).

2. To provide each department undertaking a search and each search committee copies of the following:

a. The written instructions developed pursuant to subparagraph 1, Paragraph F, Part VI of this Decree;

b. Written information concerning the affirmative action goals, including the calculations to be used in granting preferences to women, that have been set for the unit conducting the search and the

progress that the unit has made toward the achievement of such goals; and

c. Written summaries of availability pool data and applicant flow and hiring data computed in accordance with Paragraph I.E.4 of this Decree.

3. To halt, before it is completed, any search that does not follow proper affirmative action procedures.

VII. RECORD KEEPING:

The University and its academic units shall maintain all records relevant to recruitment and hiring for a period of no less than three (3) years. Records relevant to promotion, tenure, and terms and conditions of faculty employment shall be kept for a period of no less than seven (7) years.

VIII. INDIVIDUAL RELIEF:

The defendants, without admitting any liability or wrongdoing, hereby agree to pay to Shyamala Rajender, one of the named plaintiffs, the sum of One Hundred Thousand Dollars ($100,000) as compensatory damages in consideration for the dismissal and release of all claims, other than those for fees and expenses, asserted or which could have been asserted by her against defendants in this action. In ruling on defendants' Rule 41(b) motion filed at the conclusion of Shyamala Rajender's individual case in chief, the Court found as a prima facie matter that Dr. Rajender (1) "was qualified for a job" in the Chemistry Department of the University's Institute of Technology as a tenure-track assistant professor and (2) she had established a prima facie case of violation of Title VII. (See Memorandum Order dated August 14, 1979, p. 9.) Without admitting any liability or wrongdoing, defendants further agree to purge from University files and records any materials inconsistent with these findings.

The defendants hereby agree that the plaintiff-intervenors, Phyllis Kahn, Carol Gold, Bertila Herrera, Florence Gleason and Silva Azar, all of whom were granted the right to intervene on December 27, 1979 (and against whom are pending motions to dismiss, whose claims have not been fully discovered and who are not members of the subclass on trial), shall be entitled to proceed, at their individual options, under A or B below.

A. Proceed pursuant to Part II of this Decree so that each plaintiff-intervenor desiring to pursue her claim shall file with the Special Master a statement of her Claim in the form prescribed by Paragraph II.B of this Decree.

The University waives the 180-day deferral period provided by Paragraph II.A and II.D.1 of this Decree.

The Special Master shall allow ninety (90) days (or more upon request of the plaintiff-intervenor) from the date (s)he received such a Claim for discovery. During this ninety-day or more period the Claimant and the academic unit involved shall select a Hearing Panel pursuant to Paragraph II.D.5 of this Decree.

Upon completion of the discovery period, the claims of plaintiff-intervenors shall be promptly heard and decided pursuant to the provisions of Part II of this Decree. In setting claims for hearing, the Special Master shall give absolute priority to hearing the claims filed by plaintiff-intervenors.

The time periods set forth in this Option A shall commence on the forty-fifth (45th) day after the date this Decree becomes a final judgment in this action.

B. Proceed as a named plaintiff-intervenor in this action without application of any other provision of this Decree. Provided, however, that the defendants agree that the Court may appoint a master under 42 U.S.C. § 2000e-5(5), in which event the provisions at IV.B

concerning payment by the University of expenses and reasonable fees of the master shall apply.

Any of the options above shall be exercised by each of named plaintiff-intervenors within forty-five (45) days after the date this Decree becomes a final judgment in this action.

IX. NOTICE:

Upon agreement to this Consent Decree by the parties, it shall be submitted forthwith to the Court for its approval. In the event of approval by the Court, written notice of the terms of this Decree shall be given to all class members by appropriate notice, pursuant to Rule 23 of the Federal Rules of Civil Procedure, in a form and manner agreed upon by the parties and approved by the Court. Within seven (7) days following the Court's approval of this Decree, the parties shall meet and attempt to agree on the details of the form and manner of the Notice; provided, that if they do not agree on these issues the parties shall so advise the Court, and a hearing shall be held as soon as practicable, as a result of which the Court shall order that the Notice be given in such form and manner as it deems appropriate. The University will pay the cost of giving such notice. If there shall be no objection to the Decree made in response to such Notice, final judgment shall be entered on the Decree. Timely objections to the Decree shall be heard and determined as promptly as feasible. In the event that any objection to the Decree is sustained in whole or in part, or in the event of disapproval of this Consent Decree by the Court, in whole or in part, each of the parties reserves the right to trial of all issues. Provided, further, that none of the benefits or obligations conferred or imposed by the terms of this Decree shall vest until the Decree shall become a final judgment, and none of the procedures provided to implement such benefits and obligations will begin until the Decree is a final judgment.

X. DURATION AND MODIFICATION OF DECREE:

A. This Decree shall continue in effect until January 1, 1989, unless modified or extended as provided in this Part X.

B. If at any time prior to the expiration of this Decree, the University has reason to believe that any of the provisions of this Decree place it in violation of law, the University may apply to the Special Master upon notice and motion, for modification of the Decree, to conform to the law. The Special Master shall recommend modification only if (s)he finds that a provision of this Decree would place the University in violation of law.

C. On or about the first Monday of February, March, April, and May, 1988, the University shall publish a notice in the Minnesota Daily or its equivalent in a manner and form directed by the Special Master designed to give fair and adequate notice of the termination of this Decree. Any female, academic non-student employee of the University (or female applicant for such position) may, on or before September 1, 1988, file with the Special Master a motion for an order extending the operation of this Decree and/or modifying its terms. The University shall have until September 15, 1988 to respond. The Special Master shall recommend extension and/or modification of this Decree upon such motion only if (s)he finds a pattern or practice or employment discrimination in violation to Title VII at the University indicating a continuing need for this Decree. However, in no event shall this Decree extend beyond January 1, 1991.

D. A full and complete record of any such hearing under Paragraph X.B or X.C shall be maintained. On the basis of the record of said hearing, the Special Master shall make findings of fact, conclusions of law, and recommendations to the Court. The District Court's review of the findings and conclusions of the Special Master shall be governed by Rule 53(e)(2) of the Federal Rules of Civil Procedure. Upon

review of the report of the Special Master, the District Court shall enter an appropriate order and make an express determination pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason to delay entering a final judgment on the Special Master's report, shall forthwith cause a final judgment to be entered thereon and shall notify the parties that judgment has been entered. The parties fully reserve the right to appeal to the Court of Appeals for the Eighth Circuit from any such judgment entered by the District Court pursuant to the findings, conclusions, and recommendations of the Special Master.

XI. ATTORNEYS' FEES:

The University agrees to and shall pay the reasonable attorneys' fees, costs, and disbursements (including reasonable charges of expert witnesses) incurred by the Plaintiff and class members in this action. Counsel for the Plaintiff and the class shall, within twenty-one (21) days after the initial approval of this Decree by the Court, file their petitions for fees, costs, and disbursements, together with such supportive materials as they deem appropriate. The combined hearing on the Consent Decree and the Petitions for fees, costs, and disbursements shall occur not less than ninety (90) days from the date of initial approval of this Decree by the Court, unless otherwise agreed by counsel. The parties reserve all claims and defenses, including appellate rights, with respect to the amounts of reasonable attorneys' fees, costs and disbursements awarded, whether such award relates to fees, costs, and disbursements incurred prior to or after the date this Decree becomes a final judgment in this action.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Nancy Kobrin,

Plaintiff,

-v- Civil No. 4-89-810

University of Minnesota,

Defendant.

TRANSCRIPT OF CIVIL MOTION PROCEEDINGS
BEFORE THE HONORABLE CHIEF JUDGE
PAUL A. MAGNUSON

St. Paul, Minnesota

May 3, 1996

APPEARANCES:

For the Plaintiff: Stephen Rathke

For the Defendant: Julie Fleming-Wolfe

Official Court Reporter: Jeanne M. Anderson

Friday morning,
May 3, 1996
9:05 o'clock, a.m.

THE COURT: We have got the matter of Kobrin versus the University of Minnesota. Technically, Rajender, but I'm not terribly sure if Ms. Rajender is even alive anymore, with the length of time that that has been out here.

Would you note your appearances please, Counsel?

MR. RATHKE: Stephen Rathke of Lommen, Nelson, Cole and Stageberg, representing the plaintiff. Nancy Kobrin and her family are also in court today.

MS. FLEMING-WOLFE: Judy Fleming-Wolfe for the University of Minnesota.

THE COURT: Do you want to proceed, Counsel?

MR. RATHKE: Thank you, Your Honor. May it please the Court. Among the most significant, perhaps the most significant exhibit that is on the record before the Special Master is this one, Exhibit 1, which is the Rajender Decree of 1980. This was an agreement between the University and a class of plaintiffs.

Now, this is not just an employment case. And McDonnell Douglas and the three-prong test and all of its progeny I don't think are particularly important this morning. What this is, perhaps more than an employment case, it is a contract case. And the question before the Court, as it was

THE COURT: Can you help me at all with the history of what happened? Because I only know about --

MR. RATHKE: All I could do is this.

THE COURT: -- the Special Masters, you know, and we have two in there. And sometimes one hears it and sometimes another one hears it.

MR. RATHKE: I reviewed all of the cases that fall under Rajender, and of course there aren't any other cases to look at. It is either Rajender or it is not.

THE COURT: It's a unique law of its own, that is right.

MR. RATHKE: Right. So, I could find no case -- you know, I found the case which -- or the two cases which discuss the $6,000 cap, so there has been some court decisions, but there hasn't been anything on this three-person panel.

Frankly, I put it in the brief without knowing why it was gone. And the response from the University which certainly would be in a position to tell us what happened to it, simply says, and interestingly enough in the passive sense, "it has been changed" or, "it has been modified" or words to that effect, without identifying who modified it.

THE COURT: Maybe I did.

MR. RATHKE: You didn't do it in writing. What I would suggest to the Court is that the University just decided that they'd dispense with it. And, frankly, with a $6,000 cap

and with plaintiffs who are faculty members in that economic situation, there hasn't been, I don't believe, an ability on the part of too many plaintiffs to really take the University to task. And so, it just happened and they got away with it. And they continue to get away with it.

THE COURT: That may be true.

MR. RATHKE: And with this type of case, I think it is essential, because I think it important to get viewpoints from more than one individual. And I think that is one of the things that was truly lacking in this case is some fresh insight. And there certainly wasn't any in this proceeding.

THE COURT: Thank you. Ms. Fleming-Wolfe?

MS. FLEMING-WOLFE: Your Honor, thank you.

Your Honor, sometimes I feel like in this case I am shooting at a moving target as the plaintiff claimant attempts to find some method of gaining relief in the absence of discrimination. And that is the most important point here.

Your Honor, I will attempt to address all of the arguments that have been raised by the plaintiff, whether they have been, it seems to me in the reply brief, dropped for the moment or not. And if Your Honor has any questions, I would be happy to address them specifically.

First of all, Your Honor, the claimant argues that the Court applied the wrong legal standard to the claimant's claims of discrimination. And secondly, that the Court's

by the testimony of the Search Committee members, the credible and consistent testimony of those Search Committee members regarding their proceedings and the reasons for their decision regarding claimant's candidacy.

In addition, the Special Master noted there was a lack of any other evidence to support an adverse inference, no testimony. And the documents which did exist, and there were documents which did exist, notes of some other committee members that they had in their own files, did not support any adverse inference being drawn. In other words, those documents supported the testimony of the Search Committee members about the legitimate non-discriminatory reasons for claimant's nonselection, and in no way pointed to any decisionmaking that involved any discrimination or discriminatory basis.

Finally, Your Honor, the claimant now asks that we go all the way back and do this all over again in front of a three-person panel. Claimant cannot wait until after she gets an adverse ruling to assert this request.

She has waived her right to such a request. And the suggestion that she didn't know she had this right is ludicrous. She had competent, experienced counsel throughout who at the beginning of this case she had counsel that had litigated many of these matters all the way through trial in front of one Special Master.

THE COURT: But Counsel, how did we get from here to there? I really am curious about this because of the large number. Well, it isn't all that great, but a substantial number of Rajender cases that have gone through over the years.

MS. FLEMING-WOLFE: Yes, yes.

THE COURT: And this whole question, to my memory, is new.

MS. FLEMING-WOLFE: Yes, it is.

THE COURT: We have one Special Master hearing these cases.

MS. FLEMING-WOLFE: That's right, Your Honor. During the course of the litigation of these matters from its very inception, the process has changed over time. This is not something that has been, as the claimant suggested, imposed by the University despite people's objections.

THE COURT: I appointed the master.

MS. FLEMING-WOLFE: I'm sorry, Your Honor?

THE COURT: I appointed the master. We started with that.

MS. FLEMING-WOLFE: Right. So, I want to just –

THE COURT: But there was a time very early on on my watch that the Rajender Decree was amended. I don't know what was is in that. And frankly, I didn't get it out and look. Did that amend to a single, or something, or is it just a case

that somehow has just evolved into one person hearing it?

MS. FLEMING-WOLFE: That's right, Your Honor. It has not been specifically amended to allow for that, but over the course of time it has evolved into a one-person proceeding.

And Your Honor, most importantly in this case, the claimant has waived that argument because of what has preceded it.

THE COURT: I understand the argument on that part of it. I really had my concern about how we get from here to there.

I would like to bring you back, Counsel. When your opposing counsel said, this is a contract case, and he -- in essence. And in essence there is a Rajender Decree, yes; but, there is also the Guide. And the Guide causes judges in the state of Minnesota to think Pine River. And there are some obligations within the University as it relates to this Guide.

Now, at what point is it this and at what point is it that when you have got this Hiring Guide in the case?

MS. FLEMING-WOLFE: Your Honor, it is this, to use your terminology, a Rajender case about sex discrimination because that is a claim that the claimant brought. It is not that, it is not a contract case, because that claim was never brought. We never litigated whether there was a contract

MR. RATHKE: ...I read this and I assume that I am dealing with a document that I can rely on, which is the law of the case and is entitled to be enforced. And the University says: No, it is not. And the Hiring Guide, which clearly follows Rajender, that doesn't matter, either. Nothing seems to matter to the University except you have got to prove Title VII. And as the Court knows, Title VII is not the easiest thing to prove. The affirmative action obligation is what the plaintiffs expected to have gotten. And evidently, whatever they got, they can't enforce it, according to the University.

With respect to the records, Counsel says: Well, three years later we couldn't find the records. That is bologne. The fact is the Rajender claim has to be filed 90 days after the hire, within 90 days after Professor Canning was hired, these records were hot items. This wasn't anything that they had to go look at for the first time three years later. These were hot items. The University had an absolute obligation once litigation began, and litigation began within three months, to preserve those records. And they didn't.

The University says the process has changed and evolved. You know, it is a pretty good deal for the University. They are the only party on one side. And they are always there with their staff of attorneys. The plaintiffs come and go. And the University apparently believes that it can just evolve and modify this thing to suit their purposes and make it

cheaper and more difficult for plaintiffs to bring their claims. And that is what happened here. There is no excuse for it.

If the University will today say and concede that if Nancy Kobrin had asked for a three-person panel, she would have gotten one, then our claim in that regard should be waived. It is waived. If they will say: Yeah, we would have given you one if all you had to do is ask, then you are right. They are right, we waived it. But, they can't make that statement. They cannot make that statement with a straight face. They weren't going to give us anything. And if you would like the procedural history of this case you will see that we didn't -- they stonewalled from day one.

Finally, Counsel says other women proceeded past Nancy Kobrin in the selection process and one took a position elsewhere and one didn't do very good on her interview; that happened in the first search. Those were the three they named in the Form 17 in the first search. And either during that process one of them got another job or in between the searches one of them got another job and was no longer interested. The person that bombed, bombed in the first search. No female applicant in the second search got any further than Nancy Kobrin. That is a fact that was testified by everybody who was at the Search Committee. If we had the documents, we could show it to you in black and white. The University

doesn't have those; but, that is what happened. Thank you.

THE COURT: All right, thank you, Mr. Rathke.

Counsel, we thank you very much for the presentation. We will take the matter under advisement and let you know just as soon as we can. Thank you.

Certified by: /S/_____
Jeanne M. Anderson, RPR-CM
Official Court Reporter

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2674MNMI

Nancy Kobrin,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
v.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
University of Minnesota,	*	
et al.,	*	
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 16, 1997

Order Entered at the Direction of the Court:

/S/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
JAN 16 19[illegible]
OFFICE OF THE CLERK

(2)

No. 97-1002

In The

Supreme Court of the United States

October Term, 1997

NANCY J. KOBRIN,

Petitioner,

vs.

UNIVERSITY OF MINNESOTA; THE REGENTS OF THE UNIVERSITY OF MINNESOTA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner waived her objection to the special master's consideration of her claims at trial because she failed to object until after the special master filed an unfavorable report?

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STATEMENT OF THE CASE

A. Issues Properly Presented by this Petition for Writ of Certiorari.

The circuit courts are uniform in holding that an objection to the appointment of a special master must be made at the time of the appointment or within a reasonable time thereafter or the party's objection is waived. *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1410 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109, 111 S. Ct. 1019, 112 L. Ed. 2d 1100 (1991); *Spaulding v. University of Washington*, 740 F.2d 686, 695 (9th Cir.), *cert. denied*, 469 U.S. 1036, 105 S. Ct. 511, 83 L. Ed. 2d 401 (1984), *overruled on other grounds*; *Cruz v. Hauck*, 515 F.2d 322, 331 (5th Cir. 1975), *cert. denied*, 424 U.S. 917, 96 S. Ct. 1118, 47 L. Ed. 2d 322 (1976). Similarly, the circuits are uniform in holding that objections to a special master are waived where a party objects only after the master files an unfavorable report. *Jenkins v. Sterlacci*, 849 F.2d 627, 634 (D.C. Cir. 1988); *Constant v. Advanced Micro-Devices*, 848 F.2d 1560, 1566 (Fed. Cir.), *cert. denied*, 488 U.S. 892, 109 S. Ct. 228, 102 L. Ed. 2d 218 (1988); *Hill v. Duriron Co.*, 656 F.2d 1208, 1213 (6th Cir. 1981). These cases reflect the courts' desire to avoid rules that provide an incentive to withhold objections until disappointed by an unfavorable result. *Burlington Northern v. Dep't of Revenue*, 934 F.2d 1064, 1069 (9th Cir. 1991). Despite the existence of this substantial and consistent precedent, Petitioner asserts that this case presents the "important procedural question" of when a party waives its right to object to a special master.

Attempting to avoid application of precedent, Petitioner frames the issue presented as whether the federal district court has authority to unilaterally alter the terms of a consent decree. However, this case does not involve nor necessitate an analysis

of the issue of when there is modification of a consent decree. The cases of *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) and *United States v. Swift & Co.*, 286 U.S. 106 (1932) cited by Petitioner do not apply here because there was no motion to modify the consent decree. Neither was there a "refusal" to enforce the consent decree. There was a consent decree, a claim brought under the decree, a trial of the claim by a special master, a recommendation by the special master for judgment against the Petitioner, an objection by Petitioner to the special master failing to convene a three-person panel (himself and two others) to hear the trial of the claim, and a rejection of Petitioner's objection because she failed to raise it until after an unfavorable report had been filed after trial.

The issue then, is not whether there was a sufficient basis for modifying the consent decree, but whether Petitioner waived her objection to the special master hearing her claim at trial because she failed to objeot until after the special master filed an unfavorable report. Similarly, there was no "refusal" by the courts to enforce the consent decree, but rather a rejection of Petitioner's objection because it was untimely. In neither *Rufo* nor *Swift* was there an issue of whether an objection to how the special master carried out the terms of the consent decree had been waived because it was not made until after a decision had been rendered against the objecting party. In cases in which that issue has been addressed, the courts have consistently held that under such circumstances, the objection is waived.

In this case, the lower courts did not consider the issue of whether there was a sufficient basis for modification of the consent decree because there was no motion to modify under consideration. The issue raised and considered below was whether Petitioner failed to timely raise her objection to the special master. Relying on substantial precedent, the courts rejected Petitioner's attempt to cast the issue as one of

modification to the decree and resolved the case properly, on the waiver issue. The Petitioner's objection that the special master unilaterally modified the consent decree was not considered below, and properly so because Petitioner waived her objection by failing to raise it until after she had received an adverse decision from the special master.

Finally, grasping for some support for her petition where none exists, Petitioner frames the issue as one of due process. Petitioner's characterization of her petition in this way is unsupported by any legal precedent, factual assertion or further argument. The vague assertion of a due process issue hardly suffices as support for the petition.

B. Facts Material to the Court's Consideration of the Questions Presented by this Petition.

In 1980, the Respondents settled a class-action sex discrimination suit by entering into a consent decree. *Rajender v. University of Minnesota*, Civ. No. 4-73-435 (D. Minn. Aug. 13, 1980). On September 15, 1989, Petitioner filed a claim of sex discrimination against Respondents under the *Rajender* consent decree alleging sex discrimination in her non-selection to a tenure-track faculty position in Respondents' Department of Comparative Literature. Petitioner had not been advanced for final selection in the hiring process because the search committee determined that her work was not as conceptually rigorous or promising as other candidates. Petitioner argued that her non-selection was based in discrimination because she was better qualified than the male candidate who was chosen for the position. Respondents subsequently elected not to renew Petitioner's annually renewable appointment as a lecturer. Petitioner then filed a second claim under *Rajender*, alleging retaliation.

Respondents moved for summary judgment on both of Petitioner's claims. Respondents' motion was considered by a special master, who recommended that the district court grant summary judgment on both claims. The district court adopted the special master's recommendation and granted summary judgment for Respondents.[1] On appeal, the Eighth Circuit Court of Appeals affirmed summary judgment on Petitioner's retaliation claim and reversed summary judgment on the discrimination in hiring claim, reserving fact issues on that claim for determination at trial. *Kobrin v. University of Minnesota*, 34 F.3d 698 (8th Cir. 1994).

On remand, the parties briefed and argued several pretrial motions to the special master. The case was then tried to the special master from April 3 to April 7, 1995. At the conclusion of the trial, a transcript of the proceedings was prepared at Respondents' expense (pursuant to *Rajender*), and the parties submitted proposed findings and extensive argument to the special master for his consideration. The special master issued a Memorandum Opinion and Recommended Order for Judgment in Respondents' favor on February 28, 1996.

Petitioner filed an objection with the district court to the special master's Recommended Order, arguing that the evidence supported judgment in her favor. Only then did Petitioner object to the special master's consideration of her claims at trial. On her motion to the district court to reject the adverse report of the special master, Petitioner argued for the first time that the case should be remanded for a new trial because the special master heard and decided the trial of her claims rather than convening a three-person panel (himself and two others), as provided by the consent decree.

---

1. Until this time, Petitioner was represented by a lawyer who had represented, and was at that time representing many other *Rajender* claimants. At the time of the appeal of summary judgment, Petitioner's representation changed to her current counsel.

The district court reviewed the trial transcript, the special master's report, and Petitioner's objections and, holding that the factual findings were supported by the evidence and that there was no error of law, affirmed the special master's recommendation that judgment be entered for Respondents. Relying on analogous precedent under Fed. R. Civ. P. 53, establishing that a party who fails to object to a special master until after the special master files an adverse report waives the objection, the district court found that Petitioner had waived her objection to the special master's sole consideration of her claim by failing to timely object. On appeal, the Eighth Circuit Court of Appeals affirmed the decision of the district court, holding that Petitioner had waived any objection to the appointment of the special master because she waited to object until after the special master had filed an unfavorable report. Petitioner's motion for rehearing en banc was subsequently denied. Petitioner then filed this petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE OF WHEN A WAIVER OCCURS HAS BEEN CLEARLY ARTICULATED BY THE COURTS AND DOES NOT MERIT RECONSIDERATION.

Petitioner argues that her petition should be granted to clarify when an objection must be raised to a special master's failure to follow the terms of a consent decree. Petitioner cites no precedent indicating that there is any dispute among the courts on this issue, and acknowledges that application of substantial precedent under Rule 53 of the Federal Rules of Civil Procedure is dispositive on this issue in this case. Indeed, there is no question nor conflict in the courts as to when a waiver occurs.

> An objection to the appointment of a special master must be made at the time of the appointment or within a reasonable time thereafter, or the party's objection is waived.

Burlington Northern v. Dep't of Revenue, 934 F.2d 1064, 1069 (9th Cir. 1991); *citing Adriana Int'l. Corp. v. Thoeren*, 913 F.2d 1406, 1410 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109, 111 S. Ct. 1019, 112 L. Ed. 2d 1100 (1991); *see also Cruz v. Hauck*, 515 F.2d 322, 331 (4th Cir. 1975), *cert. denied*, 424 U.S. 917, 96 S. Ct. 1118, 47 L. Ed. 2d 322 (1976). Petitioner's characterization of the issue presented by this petition as one determining prerequisites to modification of a consent decree is illusory. Petitioner's case was not decided on that basis, and that issue was not addressed by the courts below. Rather, Petitioner's appeals were rejected on the merits of her discrimination claim, and because Petitioner waived her right to object to the special master when she failed to raise her objection in a timely fashion. The issue of waiver in this case was determined by proper application of substantial precedent, and review of the waiver issue is unnecessary.

On the issue of waiver presented by this case, the law is clear: objections are waived when a party objects only *after* the master files an unfavorable report. *See Jenkins v. Sterlacci*, 849 F.2d 627, 634 (D.C. Cir. 1988); *Constant v. Advanced Micro-Devices*, 848 F.2d 1560, 1566 (Fed. Cir.), *cert. denied*, 488 U.S. 892, 109 S. Ct. 228, 102 L. Ed. 2d 218 (1988); *Hill v. Duriron Co.*, 656 F.2d 1208, 1213 (6th Cir. 1981).

> These cases reflect the court's desire to avoid rules that provide an incentive to withhold objections until disappointed by an unfavorable result.

Burlington Northern, 934 F.2d at 1064.

> To permit such objections after the [master] makes his findings and recommendations would certainly not serve the cause of judicial economy. Parties who did not prevail before the [master] would routinely seek to have the reference set aside for reasons that either could have been corrected or would have stopped the proceedings if promptly brought to the referring court's attention.

Id. at 1069-1070, *citing Hill*, 656 F.2d at 1213. Finding the reasoning of the Fifth Circuit in *Cruz* to be "sound, and consistent with the policy underlying the waiver doctrine," the *Burlington* court agreed that an objection to the appointment of a special master is waived if it is made only *after* the master provides his report and recommendation. *Id.*, *citing Cruz*, 515 F.2d at 331. Otherwise,

> [a] party disappointed with a master's report would be able to obtain a "second bite at the apple" by withholding his objection to the reference until after the report.

Id.; *see also First Iowa Hydro-Electric Cooperative v. Iowa-Illinois Gas & Electric Co.*, 245 F.2d 613, 628 (8th Cir. 1957) (failure to make a timely objection to the appointment of a master either at the time of the order of reference or promptly thereafter constitutes a waiver of error). *See also United States v. Conservation Chemical Co.*, 106 F.R.D. 210 (W.D. Mo. 1985) (a party's motion to revoke the special master's authority was untimely when filed nearly nine months after the order of reference).

Here, as in *Adriana Int'l Corp. v. Thoeren*, no objection to the appointment of the special master was made until well into the proceedings, after numerous meetings, depositions and

hearings with the special master regarding discovery over a period of several months. *Adriana*, 913 F.2d at 1410. Under those circumstances, the court held that Adriana's objection to the special master was not within a reasonable time of the appointment and was therefore waived. *Id.* Similarly, in *Martin Oil Service, Inc. v. Koch Refining Co.*, 718 F. Supp. 1334 (N.D. Ill. 1989), the court denied the appellant's motion to strike the report of a special master made some two and one-half years after the master was appointed to hear the case. The *Koch* court held that the appellant had waived any objection to the special master because appellant had not objected until after the special master's report was issued.

> To hold otherwise would permit parties . . . to base their decisions whether or not to object to a particular special master on the conclusions those appointees subsequently reach. This court cannot condone such manipulation of Rule 53. . . .

Id. at 1338. The *Koch* court noted that the special master served pursuant to court appointment and, therefore, acted "as an extension of the third branch of government." *Id.* at 1338. The court noted further that while special masters perform quasi-judicial functions, unlike the traditional federal bench, they are appointed at the court's behest. "As such, special masters are more like arbitrators whose independence is best safeguarded by the parties themselves *before* the results of the arbitration are made available." *Id.* at 1339. (Emphasis in original.)

II.

THE ELEMENTS OF WAIVER WERE SATISFIED IN THIS CASE.

Petitioner argued below that waiver did not apply in this case because a party cannot waive jurisdiction. Petitioner's argument

on jurisdiction was misplaced because the issue in this case was not whether the special master had jurisdiction to hear her claim, but rather, whether his failure to follow the procedures of *Rajender* mandated a remand for a retrial. By virtue of the district court's jurisdiction over Title VII claims, the special master had jurisdiction over the subject matter of Petitioner's sex discrimination claim, which was brought under *Rajender*. Petitioner's objection was merely to the propriety of the special master hearing the case and making a report and recommendation without convening a panel. Therefore, Petitioner's objection was not to the special master's jurisdiction over her claim, but rather to the method by which her claim was considered. An objection that could be, and was, waived by the Petitioner.

Moreover, Petitioner's invocation of "jurisdiction" as a shield to waiver was rejected in *Cruz v. Hauck*, 515 F.2d at 327, where the court stated:

> Rule 53(a) authorizes a court in which any action is pending to appoint a special master. The district judge, therefore, was empowered to refer the suit to the magistrate subject to the limitations of Rule 53(b). Appellant's contention that the reference was improper is "not a case where a court has exceeded or refused to exercise its jurisdiction"; it is rather a question of whether the judge "erred in ruling on matters within [his] jurisdiction." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 261, 77 S. Ct. 309, 316, 1 L. Ed. 2d 290 (1957).

Id. at 327. The *Cruz* court reasoned further that the judge's reference was within his power, and that a challenge to that order was unlike a challenge to a court's subject matter jurisdiction.

> The latter attacks the essence of the court's powers. An order without power is void; a challenge, therefore, to subject matter jurisdiction may be raised for the first time on appeal.

Id. The *Cruz* court directly rejected Petitioner's argument.

> We see no reason why the parties to the lawsuit, for whose benefit the restrictions [of Rule 53] are imposed, may not waive their objections to a reference.

Id. at 330. Indeed, parties may consent to the use of a master under any circumstance, just as litigants may waive their personal rights to trial under an Article III Judge. *Id.* at 328; *Active Prods. Co. v. A. H. Choitz and Co.*, 163 F.R.D. 274 (D.C. Ind. 1995).

Petitioner also argued that she did not make a knowing relinquishment of her right to have a panel hear her claims because there was no clear, unequivocal, or decisive act on her part amounting to a waiver. However, Petitioner presented legal issues to the special master for his determination, prior to, during, and after the trial, including a motion for summary judgment, motions in limine, and proposed findings of fact and conclusions of law. Having submitted to the jurisdiction of the special master without objection throughout the several years this case has been litigated, Petitioner clearly waived her right to object to the special master sitting as the sole fact-finder on a trial of her claims.

Petitioner argued below that she did not raise her objection before, during or after the trial (until the special master issued his report) because Respondents would not have acquiesced in the appointment of a panel and, therefore, any prior objection

would have been futile. (Hearing Transcript, May 3, 1996, A-100.) Petitioner now speculates further that "what appears to have happened" is that Respondents and the special master simply decided to proceed in this fashion to the prejudice of pro se litigants.[2] Petitioner's arguments fail on many levels. First, Petitioner was not a pro se litigant. She was represented by competent counsel since the inception of her action.

Second, there is absolutely no support for the assertion that there was an agreement between the special master and Respondents, or any unilaterally imposed change in the process of hearing *Rajender* claims. The assertion of these conspiracy theories by the Petitioner is baseless, and designed to deflect attention away from Petitioner's waiver by assigning improper motives to Respondents and the special master.

Third, the implication that Petitioner had no knowledge of *Rajender* procedures and was supposed to be "lead" through the process by the special master, is negated by her arguments on the merits of her discrimination claim, presented to the courts below: that the special master failed to properly apply specific provisions of *Rajender* with regard to the hiring plan supplement and/or ignored additional burdens placed on Respondents under the terms of *Rajender*, to prove that *Rajender* search requirements were followed in good faith. Petitioner's arguments on the merits were based on the interpretation of specific provisions of *Rajender*, indicating Petitioner's access to and knowledge of the *Rajender* consent decree. Furthermore, Petitioner acknowledges that the provision of the consent decree directing the special master to convene a three-person panel is clearly articulated in *Rajender*.

---

2. Petitioner tries to garner the Court's sympathy by arguing that "many of the claimants appear pro se because of the $6,000 cap on recoverable attorney's fees." This, too, is an assertion unsupported in the record and inapplicable to the case at hand in any event.

Finally, Petitioner had numerous opportunities to raise the issue of the special master's consideration of her claim, by formal motion or simply by objection, but failed to do so. *See First Iowa Hydro-Electric Cooperative v. Iowa-Illinois Gas & Electric Co.*, 245 F.2d at 27 (objection to the delegation by the court to the special master "fully and completely waived by the plaintiffs" who had not presented an objection to the trial court in the form of a motion until after the master had held numerous hearings and entered numerous orders and plaintiffs had frequently invoked his jurisdiction). Under the circumstances, Petitioner cannot excuse or deny her failure to object to the special master's consideration of her claim at trial.

CONCLUSION

For the foregoing reasons, Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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